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Evidence

Mark M. Dobson*

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Abstract

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I. Introduction

This article represents the third annual survey discussing recent evidentiary developments in Florida. Having followed the Florida appellate courts carefully for three years, the author has been able to discern several general trends in Florida evidence law worth noting briefly. First, as in most years since the Florida Evidence Code's passage in 1976, very few important statutory evidentiary changes were made in 1987.¹ Second, a statistical overview of the recent cases dis-

* Professor of Law, Nova University Center for the Study of Law. LL.M., Temple University, 1977; J.D., Catholic University, 1973; B.A., Georgetown University, 1970.

1. The 1987 Florida legislature did not pass any bill altering the Evidence Code. Only four minor statutory evidentiary changes occurred last year. Florida trial courts are now empowered to refer parts of contested civil disputes for third-party mediation or nonbinding arbitration. *See* 1987 Fla. Laws 173. To encourage the parties to meaningfully participate in mediation discussions, any communications made during mediation discussions are made privileged. However, any information revealed during mediation and "which is otherwise subject to discovery or admission under applicable law or rules of court" can still be used later against a party to mediation. *See* 1987 Fla. Laws 173, § 2; FLA. STAT. § 44.302 (1987). This language is consistent with the generally accepted principle that privileges only protect communications made in certain contexts or relationships the law wants to foster and do not protect the communications' underlying facts. Paradoxically, the same bill does not protect as privileged communications made in court ordered nonbinding arbitration.

Besides court initiated mediation or nonbinding arbitration, 1987 Fla. Laws 173 also permits civil litigants to resolve their disputes through voluntary binding arbitration. When this occurs, the Florida Evidence Code applies to all proceedings. *See* 1987 Fla. Laws 173 § 4; FLA. STAT. § 44.304 (1987).

Another statutory development regarding privileges is also worth noting. Since its inception the Florida Evidence Code has recognized a psychotherapist-patient privilege, FLA. STAT. § 90.503 (1987), and in 1983 added a sexual assault counselor-patient privilege, § 90.5035 (1987). 1987 Fla. Laws 252 expanded the number of recognized evidentiary privileged communications involving psychologists or other counselors and their clients by amending Florida Statutes Chapter 490, Psychological Services, to make confidential any communication between a professional licensed under Chapter 490 and a patient or client. Fla. Stat. § 490.0147 (1987).

Finally, the new Florida Vital Statistics Act, 1987 Fla. Laws 387, FLA. STAT. §§

cussing evidentiary issues shows some results very similar to the preceding two years. Although the number of Florida appellate decisions discussing evidentiary issues declined for the straight second year,² a percentage comparison of all three survey periods shows some amazingly consistent results. In each survey period, the percentage of cases reversed for evidentiary error is virtually the same.³ In all three surveys evidentiary issues in criminal cases have occupied more attention than ones in civil cases.⁴ However, civil cases have consistently produced more reversals due to evidentiary error.⁵ Trial counsel's failure to observe the contemporaneous objection rule⁶ or otherwise preserve the

382.001-002 (1987) makes "certificates or reports of birth, death, fetal death, marriage, dissolution of marriage, [and] name change[s]" vital records and provides methods for their reporting, reproduction and attestation. This new law should make admission of vital statistics over hearsay, authentication and best evidence objections even easier than before.

2. There were 135 Florida appellate decisions in the Southern Reporter Second discussing evidentiary issues during the 1987 survey period, as opposed to 145 during the 1986 survey period and 154 in the 1985 survey period.

Likewise, Florida Supplement Second cases discussing evidentiary issues declined from eleven in the 1986 survey to nine in the present one.

3. During the present survey period, Florida appellate courts reversed 57 out of 135 cases, or 42%, for evidentiary error. This is slightly higher than the 1986 survey period's reversal percentage of 40% but matches the 1985 survey period's reversal percentage.

4. The percentage of criminal cases discussing evidentiary issues has remained virtually static in each successive survey period. During the 1987 survey period, 91 out of the 135 cases discussing evidentiary issues were criminal, 67%, while only 44 civil cases, or 33%, addressed evidentiary issues.

This is the same percentage of criminal and civil cases as in the 1986 survey and virtually the same as the 1985 survey period which had a slightly lower percentage of criminal cases, 64%, discussing evidentiary issues.

5. Evidentiary errors in civil cases during the present survey period produced a higher percentage of reversals, 48%, than in the two previous surveys, 44% in 1986, and 43% in 1985.

The percentage of reversals in criminal cases from evidentiary errors continues to be roughly around the 40% percentile mark for all three survey periods: 41% in the 1985 survey, 38% in the 1986 survey; and 40% in the present one. As with the two previous surveys, the reversal percentage in favor of defendants was actually lower, since the state won 20% of all reversals for evidentiary errors in criminal cases. Thus the reversal rate in favor of the accused due to evidentiary error was only 32%.

6. FLA. STAT. § 90.104 (1987) provides in part that: "(1) A court may predicate error . . . on the basis of admitted or excluded evidence when a substantial right of the a party is adversely affected and: (2) when the ruling is one admitting evidence, a timely objection . . . appears on the record, stating the specific ground of objection"

Florida appellate courts have consistently refused to consider evidentiary arguments when trial counsel has not made a contemporaneous objection. Cases decided during this survey merely confirmed this previously existing situation. *See Norris v. State*, 503 So. 2d 911 (Fla. 5th Dist. Ct. App. 1987) (while experts may not vouch for another witness's credibility, an objection is needed to preserve this issue); *Floyd v. State*, 503 So. 2d 956 (Fla. 1st Dist. Ct. App. 1987) (failure to object to a trial court ruling excluding evidence waives the issue for review); *Whittington v. State*, 511 So. 2d 749 (Fla. 2d Dist. Ct. App. 1987) (failure to object to admission of other crimes evidence waived issue for review).

This contemporaneous objection requirement continues to be taken quite literally. Motions in limine are not sufficient substitutes for a prompt trial objection. Nor evidently is an objection to the same evidence in a previous trial before the same judge and with the same defendant, satisfactory. *See Harris v. State*, 508 So. 2d 33, 34 (Fla. 1st Dist. Ct. App. 1987) (objection to admission of evidence that accused had defecated upon himself when arrested was still needed to preserve record although "the court already had overruled his objection to the evidence during a prior trial").

Likewise any objection it must also be correct. Counsel cannot object on one ground at trial and press additional or different grounds for reversal on appeal. *See Glendening v. State*, 503 So. 2d 335 (Fla. 2d Dist. Ct. App. 1987) (relevancy objection at trial is not sufficient to preserve hearsay issue on appeal).

Attorneys must remember the contemporaneous objection rule applies to any alleged error at the trial level and not just to ones occurring during the offering of formal proof. During this survey period, several examples of failures to remember this occurred. *See Rodriguez v. State*, 502 So. 2d 18 (Fla. 3d Dist. Ct. App. 1986) (failure to object to an interpreter's entry in the jury room during deliberations waived this issue for appeal); *Keene v. State*, 502 So. 2d 503 (Fla. 1st Dist. Ct. App. 1987) (failure to raise ex post facto argument against imposition of costs waived this issue for review); *Chambers v. State*, 504 So. 2d 476 (Fla. 1st Dist. Ct. App. 1987) (lack of objection to having jury review videotaped testimony during deliberations waived issue for appeal).

Only two exceptions apparently exist to the contemporaneous objection requirement. Even without such an objection, appellate courts can still reverse under FLA. STAT. § 90.104(3) (1987) for "fundamental errors affecting substantial rights" of a party, although this has been rarely done. *Brumage v. Plummer*, 502 So. 2d 966 (Fla. 3d Dist. Ct. App. 1987) provided a recent example of how difficult it is to make successful fundamental error arguments. After a plaintiff's verdict in a medical malpractice case, the defendant successfully moved for a new trial based on unobjected-to statements in the closing argument telling the jurors, "For you to allow them to get away with it, it's going to happen to other people. You've got to stop it right here and right now." *Id.* at 968. Although the District Court of Appeal characterized these statements as "unprofessional and prejudicial," *Id.*, it refused to consider them fundamental error and reversed the granting of a new trial. This reversal was apparently based on two grounds. First, the district court believed that the comments were not so bad that a judicial rebuke to offending counsel following an objection would not have been satisfactory. Second, the comments were not "so inflammatory as to extinguish the [opposing party's] right to a fair trial."

Additionally, even without a proper contemporaneous objection, courts will review obvious sentencing errors which produce an illegal sentence. *See Knight v. State*, 501

trial court record for appeal,⁷ plus the appellate courts' use of the harmless error rule⁸ continued to keep the reversal rate from being higher during the 1987 survey period.

This article primarily discusses the major Florida evidentiary case law developments occurring in 1987.⁹ Like the two preceding surveys,

So. 2d 150 (Fla. 1st Dist. Ct. App. 1987) (trial judge's departure from sentencing guidelines without making the mandatory record findings is reviewable even absent an objection); *Brown v. State*, 502 So. 2d 1293 (Fla. 1st Dist. Ct. App. 1987) (erroneous assessment of points in sentencing is reviewable without any contemporaneous objection); *Bellinger v. State*, 514 So. 2d 1142 (Fla. 1st Dist. Ct. App. 1987) (failure to afford defendant notice of and chance to address imposition of costs produced an illegal sentence that was reviewable even absent a contemporaneous objection). For more extensive discussion of when the lack of a contemporaneous objection will still not preclude appellate review of a sentence see *Dobson, Evidence: Survey of Florida Law 1986*, 11 NOVA L. REV. 1291, 1301-04 (1987).

7. See *State v. Wilson*, 509 So. 2d 1281, 1282 (Fla. 3d Dist. Ct. App. 1987) (Defendant's unsuccessful motion in limine seeking a pre-trial ruling preventing the state from impeaching defense character witnesses by questioning them about a specific past act of the defendant was insufficient to preserve the issue for appeal where the defendant ultimately decided not to offer character evidence at trial. Without the actual testimony, a reviewing court has no way of deciding if the impeachment would have been improper and if so, how harmful. Florida courts refuse to assume error since "[o]therwise almost any error in an in limine ruling which permits inquiry as to a prior conviction for purposes of impeachment would result in a windfall of automatic reversal without regard for factual developments at trial").

8. See FLA. STAT. § 90.104(1) (1987) requiring reversals for evidentiary errors only if "a substantial right of the party is adversely affected. . . ." Nine cases, almost seven percent of the total considering evidentiary issues during the survey period, were affirmed based on the harmless error rule. Most of these decisions produced opinions not worth discussing. See *Jones v. State*, 508 So. 2d 490, 491 (Fla. 3d Dist. Ct. App. 1987) (trial court's prevention of accused from cross-examining two state witnesses about their possible sentences for being accomplices in crimes the accused allegedly committed was harmless); *Sudderth v. Ebasco Services, Inc.*, 510 So. 2d 320, 321 (Fla. 4th Dist. Ct. App. 1987) (harmless error found despite trial court's allowing defendant to cross-examine a witness about drug involvement under the guise of bias impeachment); *Wright v. State*, 510 So. 2d 1159 (Fla. 3d Dist. Ct. App. 1987) (admission of police officer's statement of victim's hearsay description of defendant was harmless since it actually impeached the victim's in-court testimony); *Craig v. State*, 510 So. 2d 857, 864 (Fla. 1987) (harmless error in first-degree murder prosecution to admit evidence that defendant had used illegally gained money on purchase of drugs).

9. The article surveys Florida cases reported in 499 So. 2d to 514 So. 2d and in 18 Fla. Supp. 2d through 23 Fla. Supp. 2d. The survey also discusses several recent major United States Supreme Court evidence rulings which may impact Florida evidence law and notes one United States District Court opinion discussing Florida evidence law.

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this one does not discuss every area of Florida evidence law in which decisions were reported. Rather, the author concentrates on the Florida Supreme Court's recent major decisions and only occasionally discusses decisions from other courts. For completeness and as a reference for readers, the author notes the following evidence areas, not discussed in this article's main text, which generated decisions during the 1987 survey period: judicial notice;¹⁰ habit evidence;¹¹ offers to compromise;¹²

10. See FLA. STAT. §§ 90.201-207 (1987); *State v. Thompson*, 20 Fla. Supp. 2d 87, 91 (Lee County Ct. 1986) (Judicial notice was taken that one cubic centimeter is equal to one millimeter since under FLA. STAT. § 90.202(12) a fact "capable of accurate and ready determination by resort to [a] source whose accuracy cannot be questioned, viz. Webster's Dictionary." On another matter, the court noted that judicially noticing a federal agency's regulations is provided for by § 90.202(3)); *National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Underwood*, 502 So.2d 1325 (Fla. 4th Dist. Ct. App. 1987) (A party's motions and stipulations in one lawsuit may be judicially noticed in another lawsuit pursuant to FLA. STAT. § 90.202(6) (1987) as "[r]ecords of any court of this state". However, the court held that when so doing, § 90.204(3) requires the court taking judicial notice to put "copies of said documents judicially noticed . . . into the record of the case under consideration" *Id.* at 1328. This will enable an appellate court to inspect them for itself, if necessary.); *Bonifay v. Garner*, 503 So. 2d 389 (Fla. 1st Dist. Ct. App. 1987) (While the trial court may have properly judicially noticed certain maps in a quiet title action, reversal was required because of its incorrect method in doing so. Although a trial court can seek out and judicially notice material which the parties have not requested judicial notice of, FLA. STAT. § 90.204(1) (1987) requires the trial court to give notice of its intent to do so and to give them a "reasonable opportunity to present information relative to the propriety of taking notice and to the nature of the matter noticed" which was not done here); *Gulf Coast Home Health Services of Florida, Inc. v. Department of Health and Rehabilitative Services*, 503 So. 2d 415, 417 (Fla. 1st Dist. Ct. App. 1987) (while an appellate court may judicially notice "the existence of other cases, either pending or closed, which bear a relationship to the case at bar", the court without any explanation found such would be inappropriate here); *Arnold Lumber Co. v. Harris*, 503 So. 2d 925 (Fla. 1st Dist. Ct. App. 1987) (an appellate court in judicially noticing its own records, can notice arguments made in briefs previously filed with it to distinguish a former case from the one currently before it); *Ellsworth v. Ins. Co. of North America*, 508 So. 2d 395 (Fla. 1st Dist. Ct. App. 1987) (Although FLA. STAT. § 90.203 requires a court to take judicial notice of any matter in § 90.202 when the party requesting such gives timely notice to the other side and provides "the court with sufficient information to enable it to take judicial notice of the matter," § 90.202(2) does not govern the taking of judicial notice on appeal since the Evidence Code does not apply to appellate proceedings. Although the court admits that "Florida appellate courts may consider legislative staff summaries in construing statutes," *Id.* at 398, judicial notice of them should only be taken, if at all, at the trial level); *Collinsworth v. O'Connell*, 508 So. 2d 744, 746 (Fla. 1st Dist. Ct. App. 1987) (Trial court in a petition to modify a custody and visitation proceeding properly judicially noticed a court ordered psychological eval-

offers to plead guilty;¹³ accident report privilege;¹⁴ accountant-client

uation included in a previous proceeding between the same parties. Under FLA. STAT. § 90.202(6) (1987) a trial court may take judicial notice of records from the same or another case).

11. See FLA. STAT. § 90.406 (1987); *Duffell v. South Walton Emergency Services, Inc.*, 501 So. 2d 1352, 1356 (Fla. 1st Dist Ct. App. 1987) (jury verdict for defendant in a personal injury action *per curiam* affirmed. Judge Ervin, dissenting in part, argued that evidence of plaintiff's alleged habit of drug use should have been excluded since she had dropped her claim for lost earnings. Under FLA. STAT. § 90.406 "[e]vidence of the habits of an individual is [only] admissible for the purpose of showing his or her conduct upon a specific occasion — if it corroborates other substantial evidence of the occurrence of the event." (emphasis in original)).

Judge Ervin's opinion also makes a point argued by this author in an earlier survey. Since FLA. STAT. § 90.406 only talks about the routine practice "of an organization", arguably it does not regulate the admission of habit evidence about individuals. Given the statute's language, the author believes there is a strong case for arguing that evidence concerning the personal habits of an individual used to prove conduct on a particular occasion is not admissible in Florida. For further discussion of this argument, see Dobson & Braccialarghe, *Evidence: Survey of Florida Law 1985*, 10 NOVA L. REV. 1021, 1038-41 (1986).

12. See FLA. STAT. § 90.408 (1987); *Williams v. State*, 18 Fla. Supp. 2d 42, 43 (8th Cir. Ct. 1986) (evidence in a prosecution for theft of electricity that accused had eventually applied for electrical service and paid all amounts the utility claimed she owed was inadmissible under § 90.408).

13. See FLA. STAT. § 90.410 (1987); *Williams v. State*, 18 Fla. Supp. 2d 42, 43 (8th Cir. Ct. 1986) (evidence in a theft of electricity case that accused eventually paid a utility company for any electricity the company claimed she previously used should have been excluded under § 90.410); *Strickland v. State*, 498 So. 2d 1350, 1357 (Fla. 1st Dist. Ct. App. 1986) (no error in a battery on law enforcement officer prosecution to allow the state to ask a defense witness, who claimed that two police officers had just shown up at Strickland's home and that the accused only hit one of them in self-defense, if she had pled *nolo contendere* to a trespass charge stemming from the same incident. Section 90.410 should be construed consistently with Federal Rules of Evidence 410 to allow impeachment of a non-party witness based on a previous *nolo contendere* plea).

The author disagrees with *Strickland's* result. A careful reading of the opinion's facts shows the state did much more than just impeach the witness based on the *nolo* plea. The state argued that the plea showed the witness was lying. However, the only way it could do so is if the plea was taken as actually showing the witness had indeed been trespassing, which is what the state was claiming Strickland had initially told the officers and which was what actually explained their presence at his house. Thus, the plea was used as substantive evidence as well as for impeachment. Section 90.410's express language that *nolo* pleas are "inadmissible in any civil or criminal proceeding" should have excluded this evidence. At the very least, admission of the *nolo* plea should have been excluded under FLA. STAT. § 90.403 (1987) for the "confusion of [the] issues" it would likely have caused.

privilege;¹⁵ trade secrets privilege;¹⁶ witness competency;¹⁷ dead man's statute;¹⁸ juror misconduct;¹⁹ how, when and by

There is an apparent split between the district courts of appeal on whether evidence of a *nolo contendere* plea to charges stemming from the underlying facts giving rise to another criminal or civil case is admissible. For an opinion taking the opposite view see *Metropolitan Dade County v. Wilkey*, 498 So. 2d 269 (Fla. 3d Dist. Ct. App. 1982).

14. See FLA. STAT. § 316.066(4) (1987); *State v. Wagner*, 21 Fla. Supp. 2d 167 (11th Cir. Ct. 1987) (accident report privilege only prohibits a police officer, who has not advised a driver that a criminal investigation is being conducted, from testifying about any statements the unadvised driver makes, and not from testifying about the officer's observation of the driver's conduct); *State v. Harvell*, 22 Fla. Supp. 2d 128 (13th Cir. Ct. 1987) (while the privilege may protect most statements of drivers unadvised that a criminal investigation is being conducted, it does not exclude statements which admit a person's identity as a driver in an accident); *State v. Hoch*, 500 So. 2d 597 (Fla. 3d Dist. Ct. App. 1987) (merely noting that FLA. STAT. § 316.066(4) (1987) does not require suppression of a breath test's result since it makes the result non-privileged); *Duffell v. South Walton Emergency Services, Inc.*, 501 So. 2d 1352, 1357 (Fla. 1st Dist. Ct. App. 1987) (defense verdict in a personal injury action *per curiam* affirmed) (Judge Ervin concurring and dissenting argued that while a party can waive the accident report's privilege, improper introduction of the partial contents of an accident report did not automatically make the remaining portion admissible).

15. See FLA. STAT. § 90.5055 (1987); *Multinational Force and Observers v. Arrow Air, Inc.*, 662 F. Supp. 162 (S.D. Fla. 1987) (crime-fraud exception to the accountant-client privilege required production of defendant's accounting records, since the plaintiff had alleged fraud as a grounds for recovery and had made a detailed *prima facie* showing the defendant had fraudulently induced the plaintiff into a contract the defendant knew it could not perform).

16. See FLA. STAT. § 90.506 (1987); *Freedom Newspapers, Inc. v. Egly*, 507 So. 2d 1180, 1184 (Fla. 2d Dist. Ct. App. 1987) (the trade secret privilege's purpose "is to prohibit a party to a suit from obtaining valuable information that could be used to its own advantage, relying upon the duty of a witness to answer questions truthfully." Thus, where one of the parties is not a business competitor of the other, there is less danger that discovery will be abused to force disclosure of trade secrets. Furthermore, when the information sought is merely what family members of the party seeking discovery have told the objecting party, as opposed to what the objecting party does with the information in its business, no trade secret exists); *General Hotel & Restaurant Supply Corp. v. Skipper*, 514 So. 2d 1158, 1159 (Fla. 2d Dist. Ct. App. 1987) (Writ of certiorari seeking relief from trial court's order granting discovery of alleged trade secrets granted since the court followed the wrong procedure in ruling on the discovery request. A trial court confronted with such a request must first determine if the matter is a trade secret. If so, the court must consider whether there exists a "reasonable necessity for such items").

17. See FLA. STAT. § 90.601 (1987); *Fletcher v. State*, 506 So. 2d 90 (Fla. 2d Dist. Ct. App. 1987) (Every person is considered competent to be a witness. Therefore, the trial court's decision that an eleven year old child was competent to testify would

not be reversed, especially since there had been no record made concerning the child's competency).

18. See FLA. STAT. § 90.602 (1987); *In re Estate of Ireland*, 20 Fla. Supp. 2d 56, 57 (15th Cir. Ct. 1986) (Although a witness is a residuary beneficiary under a will, when the witness testifies about oral communications with a decedent, which are adverse to the witness's pecuniary interest, the dead man statute should not exclude these conversations since "his testimony would not be violative of the legislative purpose of the Deadman's Statute to prevent self-serving testimony"); *Palmer v. Liberty National Life Insurance Co.*, 499 So. 2d 903, 904 (Fla. 1st Dist. Ct. App. 1986) (Since "[a] witness's disability to testify is determined at the time of the testimony", a witness who once owned stock in the defendant company but no longer did when deposed was not disqualified as "person interested in an action" (quoting FLA. STAT. § 90.602 (1987)); *Danches v. Danches*, 503 So.2d 461 (Fla. 3d Dist. Ct. App. 1987) (merely mentioning without any explanation, that the trial court had erroneously ruled appellant was disqualified under FLA. STAT. § 90.602 (1987)); *In re Estate of Paulk*, 503 So. 2d 368, 369 (Fla. 1st Dist. Ct. App. 1987) (an attorney who drafted contested testamentary documents is not an interested person in a probate proceeding).

19. See FLA. STAT. § 90.607(2)(b) (1987) providing that "[u]pon an inquiry into the validity of a verdict . . . , a juror is not competent to testify as to any matter which essentially inheres in the verdict. . . ." Most Florida cases discussing impeachment of jury verdicts involve the question whether sufficient grounds have been alleged to hold a hearing exploring whether jury misconduct has occurred.

For recent Florida cases discussing juror misconduct see *Drew v. Couch*, 20 Fla. Supp. 2d 24 (1st Cir. Escambia Cnty. 1986) (motion for new trial based on juror misconduct in willfully failing to disclose certain facts in *voir dire* denied, since any non-disclosure would have been excusable as counsel's questions were ambiguous and also since counsel had not exercised due diligence in promptly acting to see if any concealment had occurred); *Orange County v. Fuller*, 502 So. 2d 1364 (Fla. 5th Dist. Ct. App. 1987) (speculative and conclusory allegations of juror misconduct unsupported by any proffer do not justify post-trial juror interviews); *Robinson v. MacKenzie*, 508 So. 2d 1285, 1286 (Fla. 3d Dist. Ct. App. 1987) (once jurors had been polled, agreed the announced verdict was their's and had been discharged, another verdict could not be later entered on a claim the jurors misunderstood the law during deliberations "because matters considered during deliberations inhere in the verdict"); *Brooks v. Herndon Ambulance Service*, 510 So. 2d 1220 (Fla. 5th Dist. Ct. App. 1987) (post-trial juror interview is warranted when comments of one juror to another juror during the trial may have given the second juror the impression that the commenting juror was basing his statements on outside sources extrinsic to the trial testimony); *Sconyers v. State*, 513 So. 2d 1113, 1115 (Fla. 2d Dist. Ct. App. 1987) (Trial court should have conducted in-court post-trial interview of juror in a homicide case who claimed another juror refused to follow the court's instructions on self-defense, since the second juror had been questioned on *voir dire* about his attitude towards self-defense and had expressed different views about it than during deliberations. "[J]uror misconduct sufficient to support a motion for new trial occurs when a juror responds untruthfully, even if unintentionally, to questions propounded on *voir dire*").

FED. R. OF EVID. 606(b), concerning juror competency, takes a different approach towards impeaching jury verdicts than FLA. STAT. § 90.607(2)(b). Rule 606(b) gener-

whom a witness may be impeached;²⁰ impeachment and rehabilitation

ally forbids a juror's testimony to impeach a jury verdict "except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Last term in *Tanner v. United States*, 107 S. Ct. 2739 (1987), the United States Supreme Court rendered a major opinion construing this rule. After *Tanner* and a co-defendant had been convicted of various criminal charges, *Tanner's* counsel filed for an evidentiary hearing inquiring into whether a new trial should be granted for juror misconduct. Based upon information received in a telephone call from a juror, *Tanner* alleged several jurors had been drinking alcohol at lunch breaks during trial and sleeping through some of the afternoon testimony due to this. The trial court concluded Rule 606(b) precluded any juror testimony about this and denied the motion. A second motion for an evidentiary hearing alleging juror misconduct based on an interview with another juror who claimed jury members had both consumed alcohol and illegal drugs during the trial was also denied. After the eleventh circuit affirmed the denials, the Supreme Court granted certiorari to consider "whether the District Court was required to hold an evidentiary hearing, including juror testimony, on juror alcohol and drug use during trial." 107 S. Ct. at 2739.

Reviewing Rule 606(b)'s legislative history, the Court concluded that testimony about juror drug and alcohol connection and how it may have influenced the verdict was an internal matter which was not within 606(b)'s exceptions for "extraneous prejudicial information" or "outside influence." The Court recognized that Rule 606(b) was designed to codify the common law relating to impeachment of jury verdicts and that the common law provided an exception to the non-impeachment rule when there was substantial evidence of a juror's incompetence to serve. However, the Court found the allegations of alcohol and drug use did not approach the level required. Finally, the Court found the trial court's refusal to hold an evidentiary hearing at which juror testimony would be taken did not deprive the defendants of their sixth amendment rights to a competent jury since the trial court had "held an evidentiary hearing giving petitioners ample evidence to produce nonjuror evidence supporting their allegations." *Id.* at 2751. How much *Tanner* will influence Florida law is unclear, although one pre-Code case found error in the trial court's failure to declare a mistrial when a juror showed up obviously intoxicated during one day of trial. See *Goldring v. Escapa*, 338 So. 2d 871 (Fla. 3d Dist. Ct. App. 1976). However this same case does not indicate if a later allegation of juror intoxication would be grounds for impeaching the jury's verdict. Certainly the Court's decision in *Tanner* indicates its intention to construe Rule 606(b) narrowly to prevent expanded grounds for impeaching federal jury verdicts.

For a recent critical discussion of *Tanner*, see *The Supreme Court 1986 Term*, 101 HARV. L. REV. 10, 250-60 (Nov. 1987). This commentary, among other criticisms of *Tanner*, claims that "the Court relied on inconclusive statutory language and legislative history and failed to consider the policies underlying the internal/external distinction of rule 606(b)," *Id.* at 251, and "failed to analyze whether the broader policies that generally support excluding juror testimony were served in this case". *Id.*

20. See FLA. STAT. § 90.608 (1987). This section lists the general rules regarding the impeachment of witnesses. Section 90.608(1) lists the various types of impeachment. See *State v. Hill*, 504 So. 2d 407, 409 (Fla. 2d Dist. Ct. App. 1987) ("Use of

by character evidence for truthfulness;²¹ impeachment with prior convictions;²² impeachment by inconsistent statements;²³ mode and order

inconsistent statements is a recognized method of impeaching a witness"); *Strickland v. State*, 498 So. 2d 1350, 1352 (Fla. 1st Dist. Ct. App. 1986) (the court notes that "admissibility of nolo contendere pleas, when offered against a witness other than the defendant, is governed by . . . Section 90.608(1)(b), Florida Statutes" which allows impeachment by showing bias).

The Evidence Code does not explicitly define what is an inconsistent statement. However, the Florida courts have consistently used a rather narrow definition. Only a direct contradiction will be considered an inconsistent statement for purposes of impeachment. See *Ortagus v. State*, 500 So. 2d 1367 (Fla. 1st Dist. Ct. App. 1987) (trial court did not err in preventing defense from impeaching the victim's wife with her earlier statement that "she didn't know anything" since the wife's testimony about her husband's shooting was very limited to begin with); *Calhoun v. State*, 502 So. 2d 1364 (Fla. 2d Dist. Ct. App. 1987) (when a witness testifies in court that she cannot recall ever making a certain statement when asked about it, there is no inconsistency to impeach).

Likewise, while FLA. STAT. § 90.608(2) (1987) permits a party calling a witness to impeach the witness if the witness becomes adverse, see *Wasko v. State*, 505 So. 2d 1314 (Fla. 1987), the Evidence Code does not define what constitutes an adverse witness. Sometimes the failure to establish the requisite adversity can mean the exclusion of otherwise admissible evidence or reversal when impeaching testimony is improperly admitted. Recently, in *Parnell v. State*, 500 So. 2d 558 (Fla. 1986), the Florida Supreme Court reversed a defendant's second degree murder conviction, because the state was allowed to admit otherwise inadmissible hearsay under the guise of impeaching its own witness with an inconsistent statement. The witness testified she could not recall whether Parnell had confessed his killing to her. The court considered this insufficient to make her an adverse witness since this testimony, while certainly not helping the state, was not affirmatively harmful. For adversity to exist "[t]he witness must give testimony prejudicial to the cause of the calling party," which did not happen. *Id.* at 561.

21. See FLA. STAT. § 90.609 (1987); *Allright of Miami, Inc. v. Oesterle*, 507 So. 2d 771 (Fla. 3d Dist. Ct. App. 1987) (under Section 90.609(2), evidence of a witness's reputation for truthfulness is inadmissible until the witness's character has been attacked); *Rogers v. State*, 511 So. 2d 526, 530 (Fla. 1987). (While a witness may be impeached by evidence showing the witness has a bad character for truthfulness, section 90.609 limits the attack to reputation evidence. A sufficient predicate for reputation can be laid by showing either that "the witness and the object of the testimony are members of the same general community of neighbors and associates" or that even "when members of that community are demonstrably unavailable if the trial court finds that the witness has sufficient knowledge to give a reliable assessment based on more than mere personal opinion, fleeting encounters, or rumor." Here neither alternative for reputation evidence was satisfied since the testifying witness admitted he did not really know the reputation of the person in question).

22. See FLA. STAT. § 90.610 (1987); *Sloan v. State*, 500 So. 2d 727, 728 (Fla. 2d Dist. Ct. App. 1987) (A defendant charged with possession of a firearm by a convicted

of interrogating witnesses;²⁴ calling witnesses by the court;²⁵ lay witness

felon can be impeached with his prior felony conviction if he testifies "regardless of whether that same record was needed as substantive proof of a crime"); *Williams v. State*, 511 So. 2d 1017, 1019 (Fla. 2d Dist. Ct. App. 1987) (Section 90.610 only permits asking if a witness has been convicted of a felony or crime involving dishonesty or false statement. The state should not have asked a witness if he had ever been convicted of a crime, since this question was not properly restricted to the offenses Section 90.610 permitted for impeachment. Furthermore, the state should not have inquired into the specific convictions the witness admitted committing); *Rogers v. State*, 511 So. 2d 526, 532 (Fla. 1987) (trial court erred in allowing the state to question a defense witness about his pending charges since "[i]t is only permissible to interrogate witnesses as to previous convictions, not mere former arrests or accusations, for crime." quoting *Jordan v. State*, 107 Fla. 333, 335, 144 So. 669, 670 (1932). However the court held the error was harmless.).

23. See FLA. STAT. § 90.614 (1987); *Cobas-Torres v. State*, 502 So. 2d 67 (Fla. 3d Dist. Ct. App. 1987) (trial court's refusal to allow introduction of a witness's prior inconsistent statement deemed harmless error); *Jennings v. State*, 512 So. 2d 169 (Fla. 1987) (Trial court did not err in denying admission of state witness's sworn pretrial motion in another case where the witness alleged he was insane. The witness admitted making the motion, and the motion was not admissible under a hearsay exception).

See also *State v. Hill*, 504 So. 2d 407 (Fla. 2d Dist. Ct. App. 1987) (a hearsay declarant may be impeached with an inconsistent statement without the usual requirement of first being confronted with the statement pursuant to Section 90.614).

24. See FLA. STAT. § 90.612 (1987) which covers a number of general issues relating to witness examination.

Section 90.612(2) limits cross-examination to the scope of direct examination and to matters affecting a witness's credibility. Under this latter notion, virtually anything which might cause a witness to slant testimony for or against a party should be admissible as affecting credibility. *Koon v. State*, 513 So. 2d 1253 (Fla. 1987) recently demonstrated how broad this category can be. In his first degree murder trial, Koon objected to the state's questioning a defense witness whether the witness felt threatened by Koon's brother and by a defense investigator. The Florida Supreme Court acknowledged proof of threats against a witness can not be used substantively to prove guilt "unless the threats are attributable to the defendant." *Id.* at 1256. However, the state did not use evidence of the threats that way here but rather for impeachment. The court found this proper, since "[t]he fact that a witness has been threatened with respect to his testimony may bear on his credibility regardless of who made the threat." *Id.* However, the court cautioned that circumstances might make this evidence inadmissible because of its possibly unfair prejudicial nature.

As to the former limitation, Florida trial courts have much discretion in deciding what constitutes the direct examination's scope. Counsel cannot elicit isolated or partial details of an incident or conversation and then legitimately contend that questions about the remainder are outside the scope of direct examination. In *Roberts v. State*, 510 So. 2d 885 (Fla. 1987), the Florida Supreme Court rejected the argument that the state's cross-examination of a defense witness, seeking to place in context three inconsistent statements of the chief state witness by eliciting the entire conversation between

opinions;²⁶ self-authenticating documents;²⁷ demonstrative evidence;²⁸

the two, was beyond the scope of direct.

Although there is no express rule stating so, redirect examination is generally accepted as being restricted to the scope of cross-examination. However very few cases afford any guidance on this. *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986) recently declared that "testimony is admissible on redirect which tends to qualify, explain, or limit cross-examination testimony." The Florida Supreme Court found no error in the state's redirect examination of a murder victim's mother which elicited that the victim once begged her mother not to see the defendant anymore. This redirect was done to blunt the force of defense cross-examination during which the mother admitted the victim had never complained about the defendant making sexual advances to her.

FLA. STAT. § 90.612(3) (1987) generally precludes leading questions on direct examination. However, the Florida Evidence Code does not define what is a leading question. *Murrell v. Edwards*, 504 So. 2d 35, 36 (Fla. 5th Dist. Ct. App. 1987) recently admitted "what constitutes a leading question causes lawyers (new and old) much consternation and confusion." The court, in reversing two criminal contempt orders against counsel for asking leading questions after being told not to do so, described a leading question as one "which suggests the answer," *Id.* at 37, or one "which instructs the witness how to answer or puts words in his mouth to be echoed back." *Id.*

25. See FLA. STAT. § 90.615 (1987); *McAvoy v. State*, 501 So. 2d 642, 643 (1986) ("A court witness is not a witness for either party and can be cross-examined by both sides, with neither side vouching for his truthfulness." However, when the trial court at an accused's request calls someone as the court's witness, the defense may still lose the right to first and last closing argument under FLA. R. CRIM. P. 3.250 if the witness gives "favorable testimony on behalf of the defense." *Id.* at 644; *Wasko v. State*, 505 So. 2d 1314 (Fla. 1987) (The decision to allow calling someone as a court witness will not be reversed except for an abuse of discretion. Even if someone should have been called as a court witness, allowing cross-examination of the same person as an adverse witness precludes reversal).

26. See FLA. STAT. § 90.701 (1987); *Beck v. Gross*, 499 So. 2d 886 (Fla. 2d Dist. Ct. App. 1986) (A sufficient factual predicate must be laid before lay witnesses can give an opinion of someone's competency. Merely reciting the test for competency to make a will or other dispositive document and then asking a lay witness if the witness believes someone met the definition is insufficient); *State v. Gilbert*, 507 So. 2d 637 (Fla. 5th Dist. Ct. App. 1987) (Lay witnesses are competent to give opinions about an object's weight); *Hardie v. State*, 513 So. 2d 791, 793 (Fla. 4th Dist. Ct. App. 1987) (Lay witness opinions that defendant was shown on a videotape recording of a theft were admissible although the jury would see the tape and could make its own conclusion. However, the verdict was still reversed, because the witnesses giving the opinions had been allowed to identify themselves as police officers. "The trial court should have instructed the . . . witnesses not to divulge the nature of the witnesses' occupation or the circumstances of their involvement with the appellant"); *Kight v. State*, 512 So. 2d 922 (Fla. 1987) (Defendant could not elicit a witness's opinion about what an accomplice's words and actions meant. A lay witness's opinion is only appropriate when "the witness cannot [otherwise] readily, and with equal accuracy and adequacy, communicate what he has perceived." FLA. STAT. § 90.701(1) (1987). Here the witness had

best evidence rule;²⁹ the rule on witnesses;³⁰ limitation of cross-examination's subject matter;³¹ the rape shield law;³² and several hear-

clearly described the event so the jury could make its own inferences about what certain words and actions meant).

27. See FLA. STAT. § 90.902 (1987); *State v. Thompson*, 20 Fla. Supp. 2d 87 (Lee County Ct. 1986) (Certified copy of an Intoxilyzer's registration with the state Department of Health and Rehabilitative Services was self-authenticating under section 90.902(4) as a "document authorized by law to be recorded or filed and actually recorded or filed in a public office").

28. See *Warner v. Walker*, 500 So. 2d 645, 648 (Fla. 2d Dist. Ct. App. 1986) (Videotaped statement of a five year old child who was incompetent to testify as a witness was admissible as demonstrative evidence in a custody proceeding, since the tape would allow the court to see and to evaluate the child's attitude and behavior.); *Cipollina v. State*, 501 So. 2d 2, 3 (Fla. 2d Dist. Ct. App. 1986) (admission of photographs in a second degree murder case was not error since the trial court's discretion in such matters will not be reversed "unless there is a showing of clear abuse"); *Taylor v. State*, 508 So. 2d 1265 (Fla. 1st Dist. Ct. App. 1987) (after the state admitted original tapes recordings of the defendant's conversations, the jury should not have seen transcripts of the conversations without the defendant's consent); *27th Avenue Gulf Service Center v. Smellie*, 510 So. 2d 996 (Fla. 3d Dist. Ct. App. 1987) (admission of demonstrative evidence to show how a multi-vehicle accident occurred is within the trial court's discretion); *Patterson v. State*, 513 So. 2d 1257 (Fla. 1987) (Admission in first degree murder case of photographs showing the victim's body at the crime scene was not error).

29. See FLA. STAT. §§ 90.951-958 (1987); *Wimbledon Townhouses Condominium I Association, Inc. v. Wolfson*, 510 So. 2d 1106 (Fla. 4th Dist. Ct. App. 1987) (the best evidence rule does not prohibit the admission of parol evidence to supplement incomplete records to correctly show what occurred at a meeting).

30. See *Williams v. Moran Towing & Transportation Co.*, 504 So. 2d 27, 28 (Fla. 4th Dist. Ct. App. 1987) (Trial court did not abuse its discretion in refusing to grant a new trial for defense witnesses' violation of court's sequestration order since plaintiffs "had knowledge of the violation during the course of the trial, impeached several witnesses on the basis of the violation and argued the violation in final argument." *Id.* Additionally, plaintiffs did not ask for an immediate mistrial or again try to exclude the witnesses after the violation); *Baker v. Air-Kaman of Jacksonville, Inc.*, 510 So. 2d 1222 (Fla. 1st Dist. Ct. App. 1987) (Although counsel violated the court's sequestration order by furnishing his expert witness with a daily copy of the trial testimony to be reviewed before the expert testified, this did not automatically require exclusion of the expert's testimony. Even when a sequestration violation occurs, a trial court will not be reversed for permitting the offending witness's testimony unless "the testimony of the challenged witness was substantially affected by the testimony he heard, to the extent that his testimony differed from what it would have been had he not heard testimony in violation of the rule." 510 So. 2d at 1225, quoting *Steinhorst v. State*, 412 So. 2d 332, 336 (Fla. 1982)).

Both these cases involved civil actions. In a criminal case, *Steinhorst* recognized a defendant's constitutional right to present a defense may affect the trial court's decision

on whether to exclude defense witnesses who violate sequestration orders. While this article was being written, the United States Supreme Court decided *Taylor v. Illinois*, 108 S. Ct. 646 (1988). A state trial court had found that an accused's counsel deliberately failed to fully respond to the state's pre-trial request for disclosure of potential defense witnesses. During trial and after the main state witnesses had testified, the defense sought to amend discovery by adding an undisclosed witness's name to the defense witness list. The trial court ordered the witness's testimony excluded after learning that defense counsel interviewed this witness one week before trial. The United States Supreme Court held that failing to disclose a witness's existence in discovery can result in the witness's testimony being excluded despite an accused's Sixth Amendment Compulsory Process Clause right to present a defense. The admittedly severe sanction was upheld because of the Court's concern "with the impact of this kind of conduct on the integrity of the judicial process itself." *Id.* at 656. Disciplining the offending party was sufficient justification for the sanction, since "[r]egardless of whether prejudice to the prosecution could have been avoided . . . it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate." *Id.*

While not directly dealing with a sequestration order violation, *Taylor's* result should have a major impact in this area since the Court's opinion emphasizes "adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case." *Id.* at 653.

31. See *Brown v. State*, 500 So. 2d 649 (Fla. 1st Dist. Ct. App. 1986) (No error in limiting cross-examination of state's witnesses about a battery victim's alleged homosexuality since this did not show why the witnesses might be untruthful); *Hill v. State*, 501 So. 2d 164 (Fla. 3d Dist. Ct. App. 1987) (no error in limiting cross-examination of the chief state's witness about his arrest in connection with the crime charged against the defendant since the witness was not actually charged with a crime nor granted immunity therefrom); *Patterson v. State*, 501 So. 2d 691 (Fla. 2d Dist. Ct. App. 1987) (error in prohibiting defense cross-examination of state witness about criminal charges filed against him); *West v. State*, 503 So. 2d 435 (Fla. 4th Dist. Ct. App. 1987) (No error to prevent cross-examination about a witness's previous participation in a juvenile pretrial intervention program. Since the program was completed two years before the trial, it would not bias the witness in the state's favor); *Jones v. State*, 508 So. 2d 490 (Fla. 3d Dist. Ct. App. 1987) (harmless error found in prevention of cross-examination about which crimes a witness was immunized for and about whether the witness had been an informant); *Sudderth v. Ebasco Services, Inc.*, 510 So. 2d 320 (Fla. 4th Dist. Ct. App. 1987) (harmless error in cross-examination of plaintiff's expert as to the witness's involvement with drugs); *Wasko v. State*, 505 So. 2d 1314 (Fla. 1987) (No error in preventing defendant from cross-examining his alleged accomplice in a first degree murder case about the terms of the witness's plea agreement. While the agreement's terms might have shown bias if the state had called the witness, as the defendant had called the witness and later had the witness declared adverse, the terms did show a motive to falsify); *Tompkins v. State*, 502 So. 2d 415 (Fla. 1986) (the court summarily declares, without explanation, that the trial court's restricting the defendant's cross-examination of two state's witnesses did not deprive the defendant of his confrontation rights).

say issues.³³

Before discussing several evidence topics in detail, one final recent trend is worth noting. Fifteen years ago Congress approved the Federal Rules of Evidence after several years of debate about various rule pro-

32. See FLA. STAT. § 794.022 (1987); *Vizzi v. State*, 501 So. 2d 613 (Fla. 3d Dist. Ct. App. 1986) (Trial counsel's persistence in calling sexual battery victim a prostitute after the trial court forbade the attorney from doing so was grounds for criminal contempt. While deciding this issue, the district court found it unnecessary to address whether the trial court correctly interpreted the rape shield law's protections. Even if the court's interpretation was erroneous, the proper method of dealing with the error was to obey the court's instruction and argue the error on appeal); *Floyd v. State*, 503 So. 2d 956 (Fla. 1st Dist. Ct. App. 1987) (the trial court did not err in forbidding the defendant from cross-examining the victim, his daughter, about her having had sex with her boyfriend on the day the daughter reported the defendant's assault. The defendant was allowed to establish that the victim's mother punished her for having her boyfriend in the home that day thus allowing the defense sufficient information to argue the victim fabricated the assault); *Williams v. State*, 507 So. 2d 1122 (Fla. 5th Dist. Ct. App. 1987) (In reversing defendant's conviction for ineffective assistance of counsel, the district court notes that in a kidnapping and sexual battery case, the defendant would have been able to produce evidence of the alleged victim's reputation for violence despite FLA. STAT. § 794.022 since this section only prohibits reputation evidence concerning prior sexual conduct); *Sadler v. State*, 509 So. 2d 1139 (Fla. 5th Dist. Ct. App. 1987) (Once the state introduced evidence that sexual activity had ruptured the victim's hymen, the defense should have been allowed to introduce evidence that the sexual activity was with someone other than the defendant). For a brief discussion of previous Florida cases concerning the source of injury issue raised in *Sadler*, see Dobson, *Evidence: Survey of Florida Law 1986*, 11 NOVA L. REV. at 1331-32.

Roberts v. State, 510 So. 2d 885 (Fla. 1987) was the only remotely interesting recent rape shield law case. Roberts allegedly posed as a police officer and accosted several people parked and drinking near a beach. When one of them asked for Roberts's identification, Roberts allegedly assaulted and killed him and then raped the victim's female companion. At trial, Roberts claimed he did not kill or rape anyone. He admitted his palm print was found on a car at the scene but claimed he had picked up the rape victim hitchhiking, drove to the scene at her request and then drove her home. The trial court refused to let Roberts testify the victim claimed during the ride that she was a prostitute. On appeal, Roberts argued Section 794.022 only prohibits evidence concerning either specific instances of prior sexual conduct between the victim and someone besides the defendant or reputation evidence about the victim's sexual conduct. The Florida Supreme Court admitted that Roberts's argument was correct "in a purely technical sense," *Id.* at 892, but still found no error. Instead the court found "this is precisely the type of evidence which Florida's Rape Shield Law was designed to cover." *Id.* The court characterized section 794.022 as "a codification of the rule of relevancy as it applies to the prior sexual conduct of a sexual battery victim." *Id.* While a consent defense might have changed the situation, Roberts's claim he never had sex with the victim made the evidence irrelevant.

33. See *infra* notes 209-18.

visions.³⁴ For the first ten years after the Federal Rules's passage the United States Supreme Court refused to consider any non-constitutional question about them. Several terms ago the Supreme Court began addressing some purely interpretational issues concerning the Federal Rules. There are several possible explanations for the Court's recent disposition to review issues concerning the Federal Rules interpretation. Possibly the Court was consciously delaying such questions until a body of case law developed in the lower federal courts, especially in the federal district courts which apply the Rules daily, and in those states which have modeled their own evidence rules after the Federal Rules. Another possible explanation is that perhaps only recently has there developed the requisite conflict between federal circuits about the Federal Rules necessitating Supreme Court action. Whatever the reason, the Court has finally begun addressing non-constitutional issues about the Federal Rules.³⁵ During the 1987 term, the Supreme Court will hear arguments in more cases presenting interpretational issues concerning specific language of the Federal Rule of Evidence.³⁶ Since

34. Chief Justice Warren appointed an advisory committee to propose evidentiary rules for the federal courts in March 1965. The committee circulated a Preliminary Draft of Proposed Rules for the United States District Courts and Magistrates in 1969. See 46 F.R.D. 161. After a Revised Draft was circulated in 1971, the Supreme Court prescribed the Rules effective as of July 1, 1973. See 56 F.R.D. 183. Congress delayed the effective date until it expressly approved the Rules. Following Congressional action, the Federal Rules of Evidence became effective July 1, 1975. Pub. L. No. 93-595; 88 Stat. 1926 (1976).

35. See, e.g., *Luce v. United States*, 469 U.S. 38 (1984), holding that a motion in limine is not sufficient to preserve for appellate review questions concerning the proper impeachment of a criminal defendant with a prior conviction pursuant to FED. R. EVID. 609(a); *Bourjailly v. United States*, 107 S. Ct. 2775 (1987) concerning admission of co-conspirator statements, discussed in the text accompanying notes 262-74 *infra*; *Tanner v. United States*, 107 S. Ct. 2739 (1987) discussing juror misconduct, see *supra* note 19.

36. As this article was being written, the Supreme Court decided one case partially involving the statutory construction of one federal evidence rule and had scheduled argument in an important case concerning another. The Court recently accepted another case involving the statutory construction of a third federal evidence rule.

In *United States v. Owens*, 56 U.S.L.W. 4160 (U.S. Feb. 23, 1987), the Court considered whether admitting an out-of-court identification statement made by a witness who cannot recall at trial the basis for the identification violated either the sixth amendment's Confrontation Clause or FED. R. EVID. 802. Owens was charged with the attempted murder of John Foster, a federal prison guard. Foster had been beaten with a metal pipe and hospitalized for one month for his resulting head injuries. During this time, he identified Owens as his assailant to an F.B.I. agent and also picked out

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the Florida Evidence Code was roughly patterned after the Federal Rules,³⁷ several of these cases have had or mostly likely will have a major impact on Florida's evidence law. Florida's trial courts and attorneys, more than ever before, need to pay closer attention to evidentiary developments in the federal courts.

Owens's picture from a photo spread. At trial, Foster could not remember who actually attacked him but testified he remembered his hospital identification statement and remembered picking out Owens's photograph. Foster also admitted he could not remember numerous visits from his wife and various prison officials while he was hospitalized. The Ninth Circuit reversed Owens's conviction as it concluded that admission of the prior identification violated his confrontation rights. 789 F.2d 750 (9th Cir. 1986). The court also concluded that Federal Rule 801(d)(1)(C)'s requirement that the witness be present and "subject to cross-examination concerning the statement" required that the declarant could actually be cross-examined about the statement's basis as well as the circumstances of its making and that Foster's memory loss made that impossible. The United States Supreme Court reversed the Ninth Circuit's findings. The Court found that there had been no confrontation violation since "[t]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Id.* at 4161 (quoting from *Kentucky v. Stincer*, 107 S. Ct. 2658 (1987), and *Delaware v. Fensterer*, 475 U.S. 673, 679 (1986)). Cross-examination is not denied *per se*, because a witness who willing submits to questioning is unable to remember the complete basis for his in-court testimony. Thus, "[i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness's bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory." *Id.* Additionally, the Court found that Rule 801(d)(1)(C) literally only requires cross-examination about the circumstances of the statement's making. The Court inspected the rule's legislative history and concluded that "Rule 801(d)(1)(C) was in part directed to the very problem here at issue: a memory loss that makes it impossible for the witness to provide an in-court identification or testify about the details of the events underlying an earlier identification." *Id.* at 4162.

On March 23, 1988, the Court heard arguments in *Huddleston v. United States*, 811 F.2d 974 (6th Cir. 1987) *cert. granted*, 108 S. Ct. 226 (1987), on three issues concerning Federal Rule 404(b), the federal version of Florida's *Williams Rule*. The Court will address whether admission of the other crimes evidence was error, whether such error can ever be considered harmless, and by what standard of proof the government must prove the defendant's participation in the other crimes activity when that participation is disputed.

The Court also recently granted certiorari in *Beech Aircraft Corp. v. Rainey*, 827 F.2d 1498 (11th Cir. 1987) *cert. granted* 56 U.S.L.W. 3581 (U.S. March 1, 1988) to consider whether Rule 803(8), the public records and reports hearsay exception, permits admission of evaluative conclusions and opinions found in a Navy investigator's report on a fatal airplane crash.

37. For an article comparing the original 1976 Florida Evidence Code before amendment to both the Federal Rules of Evidence and to pre-code Florida law, see Hicks and Matthews, *Evidence*, 31 U. MIAMI L. REV. 951 (1977).

II. Relevancy

A. General Relevancy Principles

The Florida Evidence Code considers information relevant if it tends "to prove or disprove a material fact."³⁸ Except for information which bears on a witness's credibility, materiality's parameters are usually set by the underlying claims and defenses involved in a particular case. Similarly, whether information tends to prove or disprove a material fact depends upon how strong the logical connection is between the information and the fact it is being offered to prove or disprove.

Even when an offered piece of information is probative of a material fact, the information can still be excluded for a variety of reasons. Florida Evidence Code Section 90.403 contemplates a weighing process which balances an item's probative worth against various matters which may improperly distract the fact finder from his task. However, section 90.403 requires exclusion only when an item's "probative value is substantially outweighed"³⁹ by its distracting qualities. Thus in close cases, the balance is tipped in favor of admissibility.⁴⁰

An item's probative worth is obviously a function of both logical deduction and substantive law. Cases discussing logical relevancy tend to be very fact specific and are highly unlikely to be duplicated. The same holds true for cases discussing the possible exclusion of probative evidence which may present "the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."⁴¹ Therefore, cases discussing the general principles of relevancy therefore usually have little precedential value. This situation existed during the 1987 survey, with only one general relevancy case being important to merit extended discussion.⁴²

38. See FLA. STAT. § 90.401 (1987).

39. FLA. STAT. § 90.403 (1987).

40. This favoring of admissibility is found in virtually all modern evidence codes. Modern evidence law presumes probative information should be given to the trier of fact unless there is clearly good reason for not doing so.

Section 90.402 of the Florida Evidence Code embodies this sentiment by its statement that "[a]ll relevant evidence is admissible, except as provided by law."

41. See FLA. STAT. § 90.403 (1987).

42. The following cases mentioned at least one of the general relevancy principles: *Williams v. State*, 18 Fla. Supp. 42 (8th Cir. Ct. 1986) (Theft of electricity conviction reversed since state's evidence that defendant paid the electric bill after the electric company discovered a tampered meter was inadmissible. This was not proba-

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*State v. Weitz*⁴³ is the only general relevancy case of any major importance. Weitz had been arrested and charged with driving under the influence. After two breath tests showed abnormally low alcohol readings the arresting officer considering Weitz's apparent state of intoxication⁴⁴ took a urine sample which when analyzed showed the pres-

tive of the defendant's guilt, since the only way Williams could have opened a subsequent account was to pay the amount the company had demanded); *Duffell v. South Walton Emergency Services, Inc.*, 501 So. 2d 1352 (Fla. 1st Dist. Ct. App. 1987) (*Per curiam* affirmance of defense jury verdict in personal injury action stemming from an automobile accident) (Judge Ervin, concurring and dissenting, argued evidence of specific acts concerning plaintiff's unauthorized use of non-prescribed drugs should have been excluded. Judge Ervin conceded that evidence of drug usage is usually relevant on damages, but argued that since the plaintiff had dropped her claim for lost wages and loss of earning capacity whatever probative value the evidence had was outweighed by its prejudicial effect. The judge further claimed that the trial court's failure to do the balancing Section 90.403 contemplates was alone grounds for reversal); *Carnival Cruise Lines, Inc. v. Rodriguez*, 505 So. 2d 550 (Fla. 3d Dist. Ct. App. 1987) (A seaman claimed he contracted a disease from being served improperly prepared meat while working for the cruise line, which caused loss of sight in one eye. To substantiate this claim, the trial court permitted introduction of the ship's medical log showing other crew member complaints. On appeal, the log's admission was found reversible error since the complaints recorded were symptomatic of a number of diseases and could not really prove the disease in question had occurred aboard the defendant's ship); *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061, 1067 (Fla. 2d Dist. Ct. App. 1987) (Trial court committed reversible error in a wrongful death case when it allowed the plaintiff to introduce a slide presentation showing the decedent at various family celebrations and outings and ending with a slide shot of the victim's casket, since this evidence prejudicially appealed solely to the jury's sympathy); *Harris v. State*, 508 So. 2d 33 (Fla. 1st Dist. Ct. App. 1987) (State's evidence of defendant's lifestyle and economic status should have been excluded in a robbery and possession of a firearm by a felon charge); *Huhn v. State*, 511 So. 2d 583, 589 (Fla. 4th Dist. Ct. App. 1987) (Trial court committed reversible error in an aggravated assault with a firearm and kidnapping case in admitting a licensed gun found in the defendant's car during his arrest. Since "there [was] nothing unlawful about Huhn's ownership of the gun, and nothing to connect the particular gun to the crimes for which Huhn was on trial", the evidence was irrelevant); *Francis v. State*, 512 So. 2d 280 (Fla. 2d Dist Ct. App. 1987) (State's evidence in a capital sexual battery case that the defendant was thirty years older than his wife and had started dating his wife when she was only fourteen was irrelevant. Expert psychological testimony that someone who would date a person so young "was attracted to adolescents" was also irrelevant. The state allegedly introduced testimony about Francis's age to prove the required element that he was over eighteen at the time of the alleged sexual batteries. However, since this element was not disputed, any probative value the evidence had was far outweighed by its prejudicial effect).

43. 500 So. 2d 657 (Fla. 1st Dist Ct. App. 1987).

44. Weitz had failed several field sobriety tests and smelled of alcohol. *Id.*

ence of various controlled substances. The defense moved to suppress all evidence of controlled substances stemming from the urinalysis. At the suppression hearing, the state presented no evidence showing "what effect the presence of these drugs in [Weitz's] urine might have on his normal faculties"⁴⁵ and the state's toxicologist admitted that merely having drugs in one's urine could not show "within a reasonable degree of scientific probability the degree of impairment at the time of the offense."⁴⁶ The trial court concluded the urinalysis evidence would not be probative and that even if it was, any probative value would be outweighed by its prejudicial effect. Realizing the possible major implications of this decision, the trial court certified the issue to the district court as one of great public importance.⁴⁷

The district court first noted that the statutes governing driving under the influence offenses provide for a urinalysis report's admissibility⁴⁸ "subject only to the usual qualifications and limitations relating to

45. *Id.* at 658.

46. *Id.*

47. The exact question certified was:

Is evidence of the mere presence of cocaine, methaqualone, and phenobarbital in the defendant's urine, in an unqualified amount, admissible in a trial of the defendant for a charge of driving under the influence of alcohol or controlled substance when considered in the light most favorable to the state, the degree of impairment, if any, cannot be determined within a reasonable degree of scientific probability?

Id.

The First District Court of Appeal declined to address this exact issue. Instead, the district court phrased the issue as "whether, under the particular facts and circumstances of this case, the trial judge erred in granting [the] motion to suppress the urinalysis report." *Id.*

Given the *Weitz* opinion's discussion, this difference in phrasing the issue should make little, if any, difference in the opinion's precedential value.

48. See FLA. STAT. § 316.1932(1)(a)(1987) and § 316.1934(1987) which provide in part that:

Any person who accepts the privilege . . . of operating a motor vehicle within this state shall . . . be deemed to have given his consent to submit . . . to a urine test for the purpose of detecting the presence of . . . controlled substances, if he is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of . . . controlled substances.

Section 316.1932(1)(a).

and also that:

Upon the trial of any . . . criminal action . . . arising out of acts alleged to have been committed by any person while driving . . . a vehicle while under the influence of . . . controlled substances . . . the results of

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competency, relevancy and weight."⁴⁹ Since relevancy depends upon the logical relationship between an offered item of information and the material elements in a case, the court then examined what the state must prove to secure a driving under the influence conviction. Florida law requires the state to prove that a defendant drove or physically controlled a motor vehicle, and that at the time defendant was under the influence of alcohol or controlled substances, such that the defendant's normal faculties were impaired. The urinalysis evidence was not relevant to show the first and last elements. However, finding controlled substances in the defendant's urine clearly was relevant to prove he was under their influence when driving. This alone would not be sufficient to convict since the influence might not have been so great that normal faculties were impaired, but that did not make the urinalysis any less relevant. Thus "[t]he trial court erred in finding evidence of drugs . . . inadmissible unless it could be linked quantitatively to impairment."⁵⁰ The district court likewise rejected Weitz's argument that any logical relevance the urinalysis had was outweighed by the prejudice it would generate in the jurors' minds against him. While the court conceded this prejudice might exist, measures such as challenges for cause and peremptory challenges in voir dire were sufficient to deal with it.

Weitz is clearly an important decision. Assuming the state can prove drug sampling and testing was done according to prescribed statutory and administrative requirements, *Weitz* virtually establishes a *per se* rule for the test results' admissibility in a driving under the influence charge. While criminal defense attorneys might not like the decision, on careful reflection, they should concede the first district ruled correctly. The legislature has made impaired driving under the influence of certain drugs criminal. Had the first district reached a contrary conclusion and excluded the urinalysis report, the state would have been left with virtually no way of proving a driver had drugs in his/her system when driving.⁵¹ A defense decision would have practically obliterated the "drugged driving" offense. All county court prosecutors and trial judges should carefully note and follow the *Weitz* result.

any test administered in accordance with § 316.1932 . . . shall be admissible when otherwise admissible. . .

Section 316.1934(2).

49. *Weitz*, 500 So. 2d at 658.

50. *Id.* at 659.

51. Perhaps in a rare instance where a driver admits to having just used drugs, this would not be so. However, this is very unlikely to occur.

B. Character Evidence: Foundational Requirements for Reputation Evidence

Under the Florida Evidence Code, circumstantial character evidence is admissible only in criminal cases.⁵² Florida Statutes section 90.404 gives the defendant in a criminal case the power to initially decide whether circumstantial character evidence will be offered. When a criminal defendant testifies, the accused's character for *truthfulness only* is placed in issue for a limited attack just like the truthfulness of any other witness.⁵³ Therefore, unless the defendant elicits circumstantial evidence of good character for a certain trait, the door to character evidence should remain closed.⁵⁴ The state should not be able to put on character evidence to show an accused criminal has acted in conformity

52. Unfortunately this simple proposition is not explicitly stated in the Florida Evidence Code. However, a close reading of FLA. STAT. §§ 90.404(1)(a) and (b) implicitly demonstrates it. Section 90.404(1)(a) only mentions proof concerning the character of an *accused* and § 90.404(1)(b) only mentions "character of the victim of the crime". Neither the word "plaintiff" nor the word "defendant" appear in § 90.404.

Unless the character of someone is a substantive issue in a civil case, such as in a defamation or custody case, admitting circumstantial proof of a party's character to show the party has acted in conformity therewith on a particular occasion should be automatic error. See *Duffell v. South Walton Emergency Services*, 501 So. 2d 1352 (Fla. 1st Dist. Ct. App. 1987) (The first district *per curiam* affirmed a defense jury verdict in a personal injury lawsuit stemming from a car accident. However, Judge Ervin, concurring in part and dissenting in part, argued admission of the plaintiff's drug usage was erroneous on several grounds, one of which was that even if this was character evidence, § 90.404 makes circumstantial character inadmissible in civil cases.).

53. See FLA. STAT. § 90.404(c) (1987) which allows the character of a witness to be attacked pursuant to §§ 90.608-610.

54. Under FLA. STAT. § 90.404(1)(a)(1987), once the defendant elicits circumstantial evidence of good character for a certain trait, the state may produce evidence "to rebut the trait." However, FLA. STAT. § 90.405(1), unlike the Federal Rules of Evidence, appears to limit the rebuttal's form to reputation testimony and apparently does not allow evidence of specific instances of conduct to rebut circumstantial evidence of good character. See *Kruse v. State*, 483 So. 2d 1383 (Fla. 4th Dist. Ct. App. 1986).

For an extended discussion of this limitation and a criticism of both *Kruse* and § 90.405(1), see Dobson, *Evidence: Survey of Florida Law 1986*, at 11 NOVA L. REV. 1291, 1313-16 (1987).

Readers should note that even where the trial court has incorrectly indicated by a pre-trial ruling that the state will be allowed to impeach defense character witness on cross-examination by questioning about specific instances of the defendant's conduct, failure to have the character witnesses testify may waive the error. See *supra* note 7.

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therewith when the crime(s) charged were supposedly committed.⁵⁵

Florida Statute section 90.404 specifies *when* circumstantial proof of character is admissible but does not specify the proper method of eliciting this evidence. Section 90.405 specifies *how* character evidence may be proven, depending upon whether character is being used circumstantially or whether a person's character is a substantive issue in the case. When only circumstantial character evidence is being introduced, section 90.405 provides that "proof may be made by testimony about [the person's] reputation."⁵⁶ The Florida Evidence Code takes a more restrictive approach to how character may be circumstantially proven than the Federal Rules of Evidence.⁵⁷

Florida has also taken a restrictive approach to admission of circumstantial character evidence in another way. While the Florida Evidence Code allows a person's character to be proven by reputation evidence, the Code does not specify what foundation is needed for this. Reputation evidence must clearly be based on more than what one person thinks. One noted writer on the subject has claimed that "[t]he object of the law in making reputation the test of character is to get the aggregate judgment of a community rather than the personal opinion of the witness which might be considered warped by his own feeling or prejudice."⁵⁸ Perhaps in confining proof of character to reputation there is a feeling that "in numbers there is safety." If enough people have talked about someone's particular trait that the person has ac-

55. For several recent cases illustrating this, see *Hepler v. State*, 510 So. 2d 1006 (Fla. 4th Dist. Ct. App. 1987) (the state's evidence in a grand theft charge that the defendant made false statements in her employment applications with four banks constituted inadmissible evidence concerning the defendant's character for truthfulness and required a reversal); *Francis v. State*, 512 So. 2d 280, 282 (Fla. 2d Dist. Ct. App. 1987) (a child psychologist's testimony that the accused had "a personality characteristic of being attracted to children" was inadmissible in a child sexual battery case, since the state had offered it to prove the accused acted in conformity with this personality at the time of the alleged sexual batteries).

56. See FLA. STAT. § 90.405(1) (1987). However when a person's character is a substantive issue in a lawsuit, because it is "an essential element of a charge, claim, or defense, proof may be made of specific instances of [the person's] conduct." (FLA. STAT. § 90.405(2) (1987)).

57. For comparison see FED. R. EVID. 405, *Methods of Proving Character*, which partially provides that: "(a) In all cases in which evidence of character . . . is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion . . ." (emphasis added.).

58. See Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 513 (1939).

quired a reputation in that regard, there is logic in assuming the reputation is likely to accurately reflect the person's character. However, problems arise in determining whether an adequate foundation for reputation testimony is established.

One recent case which shows Florida's answer to this problem represents a somewhat antiquated approach. In *Webster v. State*,⁵⁹ the defendant was charged with second-degree murder stemming from a shooting outside a night club. After the jury found Webster guilty of manslaughter with a firearm, he appealed claiming the trial court erred in excluding some of his proffered character evidence about the victim. Webster admitted shooting the victim but argued self-defense. To bolster this claim, Webster presented one witness who had been a college roommate of the victim for one and one-half years. The witness also testified he knew at least twelve other people who also knew the victim in college. When Webster tried to have the witness testify about the victim's reputation for violence, the state successfully objected on grounds that the victim's reputation in "a definable community"⁶⁰ had not been established.

The First District Court of Appeal acknowledged that Florida law allows a criminal defendant to present reputation evidence about a victim's character to show the victim acted a certain way at the time in question.⁶¹ However, the court affirmed exclusion of the character evidence, because it felt there was not a sufficient foundation to merit the evidence's admission.

The court's reasoning is somewhat puzzling. The court admitted

59. 500 So. 2d 285 (Fla. 1st Dist. Ct. App. 1986).

60. *Id.* at 287. The state also objected that because the witness acknowledged he had hardly seen the victim or the victim's friends for three years before trial, the reputation testimony was too remote. The First District Court never addressed this point. *Id.*

The state was probably correct in objecting to admission on this second basis. Reputation testimony is only a way of trying to prove character, thus while it may reflect the kind of person someone is, it also may not. As the Florida Supreme Court recently said, "character is what a man actually is, while reputation is what his neighbors say he is." *Dragovich v. State*, 492 So. 2d 350, 354 (Fla. 1986). Character is not likely to be a static thing. Most people change (and hopefully mature) over time. A person's character several years before an event may not be the same as it is several years later. This is arguably even more true when dealing with people in their formative years, such as college.

61. See FLA. STAT. § 90.404(1)(b)(1987) which provides that despite the general ban on circumstantial character evidence, "evidence of a pertinent trait of character of the victim of the crime [may] be offered by an accused."

shows that the court immediately qualified this, stating that " 'the community' or 'neighborhood' whose estimate of a person's character or reputation is most important is the community or neighborhood where he or she is best known."⁶⁷ Both of the later cases *Webster* also cites rely on *Hamilton*. Yet *Hamilton* did not expressly declare that the proponent of reputation evidence must first demonstrate an inability to show reputation in a residential community before reputation elsewhere can be shown. Furthermore, even if *Hamilton* did establish this proposition, the premise behind it certainly needs rethinking when one compares 1988 Florida with how Florida life and society must have been.

Hamilton was decided in 1937, over 50 years ago! Perhaps it was reasonable then to assume that one's reputation would be best known where a person lived. This same assumption cannot be made today. Today people spend at least as many hours away from home as they do at their residence. Even the nature of many Floridians residences has drastically changed in the fifty intervening years. Floridians now live in townhouses, condominiums, and multi-unit apartments as well as the traditional single family dwelling. Obviously having a general reputation in some of these "residential communities" is extremely difficult, if not impossible.⁶⁸ Yet, this is what *Webster* seems to require an attorney to attempt to establish before shifting to proof of reputation elsewhere.

Finally, *Webster* does not even address why someone may not show a person's character in a variety of settings, including the home community, if possible. *Webster* certainly does not claim that a person acts the same way at home, work, and recreation. Since a person's conduct may vary depending on the accompanying setting the person is in, reputation evidence of character should not be confined to the residential community.⁶⁹ *Webster* demonstrates the need for Florida courts to

67. 176 So. at 94. In *Hamilton*, where all the witnesses only knew the defendant's reputation at work but not in his home community, the supreme court felt the definitions of community or neighborhood "should be expanded to take in the place in the same city where the defendant worked day after day and those who there came in daily contact with her for several years and knew her and her reputation and character among the numerous other people who worked and labored in the same hotel." *Id.*

68. Readers might wish to ponder whether "residential community" still means the city or neighborhood one lives in. Can someone's reputation in a high-rise apartment qualify as reputation in a residential community? This question show why *Webster* is a troublesome opinion.

69. Support for allowing reputation evidence to freely come from beyond the residential community implicitly comes from the Florida Evidence Code. See FLA. STAT. §

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re-think how the foundational predicate for proof of reputation can be met.⁷⁰

C. Other Crimes, Wrongs, or Acts

Florida Statute section 90.404(2) codifies the pre-Code "*Williams Rule*"⁷¹ prohibiting the introduction of evidence concerning the defendant's other crimes, wrongs or acts for the *sole* purpose of proving a propensity to crime in general or to a particular type of crime. However, when there is another legitimate use, evidence of other bad acts may be admissible.⁷² Although this section did not draw as much attention as in earlier surveys, many cases still addressed *Williams Rule* issues. Furthermore, cases discussing other crimes evidence generated more reversals than any other evidence area.⁷³

90.803(21) (1987) which explicitly makes "[e]vidence of reputation of a person's character among his associates or in the community" a hearsay exception. The above italicized words show that the drafters probably contemplated that character could be freely based on reputation in a variety of settings.

70. For another recent case discussing the foundational predicate needed for reputation testimony see *Wisinski v. State*, 508 So. 2d 504 (Fla. 4th Dist. Ct. App. 1987). This court correctly found there was insufficient proof of reputation in the community, since the witness only spoke over one year's time with three or four people who worked with the defendant in a small muffler shop.

71. See *Williams v. State*, 110 So. 2d 654 (Fla. 1959) cert. denied, 361 U.S. 847 (1959).

72. See FLA. STAT. § 90.404(2)(a) (1987) which states:

Similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

There is a surprising lack of articles discussing the *Williams Rule*. For a recent two part article discussing the *Williams Rule* in general and also arguing how courts should apply it in child sexual abuse cases see Fennelly & Watson, *Logical Logos/Legal Relevancy: A Look at the Williams Rule in Florida*, 61 FLA. B. J. 49 (October 1987) and 61 FLA. B. J. 57 (November 1987).

73. Ten out of twenty cases found reversal error in the admission of other crimes evidence. Additionally, one of the ten opinions affirming a lower court decision was in the defendant's favor.

Other crimes evidence cases usually have a high percentage of reversals due to the prejudicial effect this information can have on a fact finder. Recently one district court of appeal questioned what should be the appropriate standard for deciding whether the erroneous admission of other crimes evidence is harmless. In *Lee v. State*, 508 So. 2d 1300 (Fla. 1st Dist. Ct. App. 1987), the First District Court of Appeal reversed a

Most cases discussing section 90.404(2) presented rather standard

defendant's multiple convictions stemming from an armed kidnapping, rape and robbery in what is a classic example of poor prosecutorial judgment and prosecutorial "overkill." The victim and two friends who were with her when she was kidnapped identified the defendant at trial. Additionally, scientific evidence established that the victim had been attacked by someone in the defendant's blood group. Finally the defendant's fingerprints were found in the victim's car. Even with all this evidence, the state still produced evidence that one day after the abduction and rape in Panama City, Lee robbed a bank in Tallahassee. The state argued the robbery evidence was admissible as part of the *res gestae* of the previous day's crimes. The first district first correctly found that there was no unusual similarity between the crimes and that there was no testimony linking the two incidents. Evidence of the bank robbery was not essential for the jury's understanding of the previous day's crimes.

After finding the other crimes evidence inadmissible, the court addressed whether its admission was harmless. FLA. STAT. § 59.041 (1987) permits a reversal only when "the error complained of has resulted in a miscarriage of justice." The court noted that erroneous admission of *Williams* Rule evidence is "presumed harmful because of the danger that a jury will take bad character or the propensity to commit the collateral crime as evidence of guilt of the crimes charged." *Id.* at 1302. However the first district felt that even with the improperly admitted evidence, the state had proven Lee's guilt by "clear and convincing, probably conclusive evidence." *Id.* at 1303. Despite this, the court still found itself compelled to reverse Lee's convictions because of the Florida Supreme Court's statements concerning the harmless error rule in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). There, the supreme court declared that

The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. . . . The question is whether there is a reasonable possibility that the error affected the verdict.

Id. at 1138.

Under this standard, the first district found reversal required, as it could not eliminate any reasonable possibility the erroneously admitted evidence affected the verdict, especially since the state emphasized the bank robbery evidence in closing arguments. Indeed, the district court found that "[t]he [closing] argument leads to the inescapable conclusion that the prosecutor was asking the jury to find [Lee] guilty, at least in part, because he was clearly a very bad man intent on committing crimes. . . ." 508 So. 2d at 1303.

Since the first district felt there was a conflict between § 59.041 and the *DiGuilio* test, it certified the following question as one of great public importance:

DOES THE ERRONEOUS ADMISSION OF EVIDENCE OF COLLATERAL CRIMES REQUIRE REVERSAL OF APPELLANT'S CONVICTION WHERE THE ERROR HAS NOT RESULTED IN A MISCARRIAGE OF JUSTICE BUT THE STATE HAS FAILED TO DEMONSTRATE BEYOND A REASONABLE DOUBT THAT THERE IS NO REASONABLE POSSIBILITY THAT THE ERROR AFFECTED THE JURY VERDICT?

The supreme court granted certiorari to address this question and scheduled oral

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issues. Most *Williams* Rule cases during this survey also offered little significant discussion.⁷⁴ As in past years, courts found *Williams* Rule erroneously admitted when the other crimes were not sufficiently similar to be relevant to the crimes charged⁷⁵ and when there was insufficient proof that the defendant had actually been involved in the alleged other crimes.⁷⁶ *Williams* Rule evidence was used most frequently to prove identity,⁷⁷ although other crimes evidence was also admitted to

arguments for March 31, 1987.

74. In several cases, the "discussion" of *Williams* Rule issues is so summary one wonders why the court involved bothered to discuss the issue at all. One case does not even mention what the other crimes evidence was, what it was offered for and why the appellate court concluded it was "clearly admissible under the *Williams* Rule." See *Whittington v. State*, 511 So. 2d 749, 750 (Fla. 2d Dist. Ct. App. 1987).

Several other opinions were so summary that they provide little or no guidance in this area. See *Wasko v. State*, 505 So. 2d 1314, 1317 (Fla. 1987) (summarily concluding with only a brief description of the other crimes evidence that it was "so dissimilar from the instant crime as to be irrelevant" to show a state witness killed a homicide victim instead of the defendant); *O'Steen v. State*, 506 So. 2d 476 (Fla. 1st Dist. Ct. App. 1987) (summarily concluding that evidence showing a defendant charged with being a convicted felon in possession of a firearm had in the past possessed and fired a gun should not have been admitted since it was only propensity evidence); *Brown v. State*, 513 So. 2d 213, 214 (Fla. 1st Dist. Ct. App. 1987) (summarily concluding that *Williams* Rule offered by the defense to show a burglary and attempted robbery defendant had been misidentified by a robbery victim in another case was not material since "[t]he fact that another victim in another case misidentified [Brown] has no relevancy to the credibility of the identification testimony of the witnesses in the present case.") This author believes *Brown* is a wrong decision. The state originally intended to use the *Williams* Rule evidence but withdrew its notice of intent when the misidentification was shown! The defense should have been able to use the evidence to show that someone who looked like Brown was committing crimes similar to that Brown was charged with. If the court had based its exclusion on a lack of similarity between the two crimes, its decision would have been correct; but it did not follow this reasoning.

75. See *Garrette v. State*, 501 So. 2d 1376 (Fla. 1st Dist. Ct. App. 1987); *Ables v. State*, 506 So. 2d 1150 (Fla. 1st Dist. Ct. App. 1987); *Weitz v. State*, 510 So. 2d 1060 (Fla. 4th Dist. Ct. App. 1987); *Francis v. State*, 512 So. 2d 280 (Fla. 2d Dist. Ct. App. 1987); *Frieson v. State*, 512 So. 2d 1092 (Fla. 2d Dist. Ct. App. 1987).

76. See *Huhn v. State*, 511 So. 2d 583 (Fla. 4th Dist. Ct. App. 1987) (evidence of defendant's involvement in drug transactions offered to show motive for a kidnapping and assault should not have been admitted, since the only connection between the accused and the transactions rested on inadmissible hearsay).

77. The use of other crimes evidence to prove identity involves a multi-step inferential process. First, the defendant must be sufficiently connected with the other crime. Second, the other crime must have a sufficient number of unique characteristics. Third, the crime charged must have enough of the same unique characteristics to infer that the defendant is the person responsible for both crimes.

show knowledge⁷⁸ and motive.⁷⁹ Florida courts also found that where

In using other crimes evidence to prove identity, courts must carefully assess whether the two crimes are actually unique enough to be considered similar. The Florida Supreme Court has stated that "[a] mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations." *Peek v. State*, 488 So. 2d 52, 55 (Fla. 1986). Trial courts sometimes err in admitting *Williams* Rule evidence by finding uniqueness in a small number of characteristics that actually are quite commonplace. *Garrette v. State*, 501 So. 2d 1376 (Fla. 1st Dist. Ct. App. 1987), recently reversed a defendant's possession and sale of marijuana convictions because of such an error. Garrette allegedly sold marijuana in a backyard shed to an undercover police officer who was the state's only eyewitness to the transaction. The state showed Garrette had been arrested both before and after the crime charged for having marijuana in his car. The state argued that evidence showing that all the incidents involved marijuana in plastic bags was a unique characteristic showing the connection between both crimes. The third district rejected this argument since "[t]his last [of three] similarit[ies], the packaging of marijuana in plastic bags, is, of course, so common as to amount to no similarity at all." *Id.* at 1379.

The admission of the other crimes evidence in *Garrette* was error not only because there is nothing unusual in finding marijuana in plastic bags when people have it, but also because there were only three possible points of similarity present between the crimes. While proving the requisite similarity between the crime charged and the other crime the defendant supposedly committed is not just a counting exercise, the more points of similarity present, the more likely the same person actually committed all the acts. For two recent opinions which carefully identified a number of points of similarity in upholding admission of *Williams* Rule evidence to show identity see *Rogers v. State*, 511 So. 2d 526 (Fla. 1987) (ten common characteristics found between two other robberies and the attempted robbery involved in a murder charge); *Kight v. State*, 512 So. 2d 922 (Fla. 1987) (the court identified six common elements between an attempted robbery and the robbery which resulted in defendant being charged with murder).

For other recent cases involving use of other crimes evidence to prove identity see *Wasko v. State*, 506 So. 2d 1314 (Fla. 1987); *Frieson v. State*, 512 So. 2d 1092 (Fla. 2d Dist. Ct. App. 1987); *Brown v. State*, 513 So. 2d 213 (Fla. 1st Dist. Ct. App. 1987).

78. See *Garcia-Torres*, 504 So. 2d 534 (Fla. 1st Dist. Ct. App. 1987) (proof that defendant had been arrested before for possession of marijuana under somewhat similar circumstances was admissible in a later possession of marijuana trial to show his knowledge that the substance found in his camera case was marijuana).

79. See *Craig v. State*, 510 So. 2d 857 (Fla. 1987) (evidence that defendant had been stealing cattle from a murder victim properly admitted to show the motive behind the victim's murder); *Kight v. State*, 512 So. 2d 922 (Fla. 1987) (defendant's racist remarks when he attempted to rob and perhaps kill one black cab driver were admissible to show the motive behind another black cab driver's murder); *Taylor v. State*, 508 So. 2d 1265 (Fla. 1st Dist. Ct. App. 1987) (Evidence defendant had been charged with another crime was admissible to show motive in a witness tampering case. However the court reversed because the trial court improperly allowed the state to specify the nature of the other charge, sexual battery, instead of just informing the jury that another

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other crimes evidence is so "inextricably intertwined" with the offense on trial, that separating the two is impossible, proof of the other crimes is admissible to show the *res gestae* of the offense charged.⁸⁰ Finally, one case discussing *Williams* Rule evidence and the collateral estoppel doctrine showed how the use of other crimes can sometimes backfire against the state.⁸¹

D. *Williams* Rule Evidence in Child Sexual Abuse Cases

The only *Williams* Rule case worth extended discussion occurred in a child sexual battery case. The criminal law has recently been much concerned about illicit sexual activity between adults and children. Although *Williams* Rule evidence is theoretically not admissible when its only relevance is to show the defendant's propensity, courts in child sexual battery cases often strain their reasoning to provide what they view as necessary protection for innocent child victims. Last year's survey reviewed use of *Williams* Rule evidence in child sexual battery cases and criticized what the author argued amounted to the appellate courts false and faulty reasoning.⁸² That article urged the Florida Supreme Court to "review the positions taken towards *Williams* Rule in recent child sex abuse cases"⁸³ and to either "frankly admit that *Williams* Rule evidence is being allowed in as propensity evidence and find

charge existed).

80. The *res gestae* approach to other crimes assumes that where the two crimes are so closely linked, there is a factual necessity to present evidence of both to give the jury a cohesive picture. For a recent example see *Austin v. State*, 500 So. 2d 262 (Fla. 1st Dist. Ct. App. 1986) (evidence that shortly before the defendant attempted to rob and kill one victim, he had unsuccessfully tried to rob and shoot another person was admissible as part of the offense's *res gestae*).

Unless the offenses are close in time, as in *Austin*, they must have some demonstrable factual connection besides the person who allegedly committed both. For a recent *res gestae* case finding reversible error due to an insufficient connection between a robbery committed one day after the charged kidnapping and sexual assault, see *Lee v. State*, 508 So. 2d 1300 (Fla. 1st Dist. Ct. App. 1987).

81. See *State v. Short*, 513 So. 2d 679 (Fla. 2d Dist. Ct. App. 1987) (a defendant could not be tried for a crime when the evidence supporting the charge had been admitted pursuant to the *Williams* Rule in an earlier criminal case where the same defendant had been found not guilty).

For a brief discussion of this topic see Dobson & Braccialarghe, *Evidence: Survey of Florida Law* 1985, 10 NOVA L. J. 1021, at 1048-52 (1986).

82. See Dobson, *Evidence: Survey of Florida Law* 1986, 11 NOVA L. REV. at 1320-24.

83. *Id.* at 1324.

sufficient justification for this"⁸⁴ or to "severely limit when this type of evidence can be used in child sex abuse cases."⁸⁵

During this past survey period, the Florida Supreme Court in *Heuring v. State*⁸⁶ finally took a definitive and honest approach towards use of *Williams* Rule evidence in child sexual battery cases. The state charged Heuring with sexually molesting his stepdaughter when she was between seven and twelve years old. The trial court permitted the state to bolster its case by allowing Heuring's daughter to testify that he had sexually battered her when she was between seven and fifteen. Since these allegedly similar acts occurred twenty years before the defendant supposedly sexually battered his stepdaughter, Heuring claimed they were too remote to be relevant and also claimed the other acts had no unique characteristic similar to the ones charged. After Heuring's conviction, the First District Court of Appeal affirmed the trial court's other crimes rulings.⁸⁷ The district court admitted an event's remoteness in time may be a reason to exclude evidence about it but concluded that the mere passage of time itself is not important but rather "the effect of the passage of time on the evidence."⁸⁸ Since the adult daughter's memory regarding the criminal act had not faded, remoteness was no problem. As to the alleged absence of unique characteristics between the two series of events, the first district found this type of crime could occur "only generationally."⁸⁹ Since Heuring "twice had the opportunity to sexually batter young females under his familial authority and did so in like manner on each occasion,"⁹⁰ the court found the uniqueness requirement satisfied.⁹¹

The Florida Supreme Court affirmed in an opinion weak in reasoning, and surprising for the extreme position taken towards *Williams* Rule evidence in child sexual battery cases. Heuring again made the

84. *Id.*

85. *Id.*

86. 513 So. 2d 122 (Fla. 1987).

87. 495 So. 2d 893 (Fla. 1st Dist. Ct. App. 1986).

88. *Id.* at 894.

89. *Id.*

90. *Id.*

91. Unfortunately the district court never explained what was the "manner" of the sexual battery. The supreme court's opinion suffers from the same omission.

Florida is not alone in not requiring strict similarity when child sexual battery offenses are involved. See Fennelly & Watson, *Criminal Law*, 61 Fla. B.J. 51 (Nov. 1987), declaring that "several jurisdictions have candidly admitted the relaxed rule for admission of similar fact evidence in sex offense cases."

same two arguments against admission. The supreme court apparently found remoteness no obstacle to admission for several reasons. First, since the daughter supposedly still remembered being sexually battered "the passage of time had no effect on the witness's memory."⁹² Second, the court felt a twenty year gap between the alleged crimes was perfectly understandable in cases of this sort, since "the opportunity to sexually batter young children in the familial setting often occurs only generationally."⁹³ After addressing the remoteness issue, the supreme court "answered" *Heuring's* argument that there was not sufficient similarity between the two series of crimes by avoiding it. The court agreed that given the potentially prejudicial nature of similar fact evidence, it "must meet a strict standard of relevance. The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offenses."⁹⁴ However, like the district court, the supreme court never attempted to specify what these unique characteristics were in *Heuring*. Instead, the court merely went on to discuss how "[c]ases involving sexual battery committed within the familial context present special [credibility] problems";⁹⁵ since there is often little or no evidence besides the victim's testimony. *Heuring* acknowledged the many alleged uses courts have come up with to justify the admission of other crimes evidence in such cases come close to being nothing more than evidence of "sexual disposition."⁹⁶ However, instead of setting up strict requirements for the admission of *Williams* Rule evidence in these cases, the Florida Supreme Court did exactly the opposite, finding without any explanation that "the better approach treats similar fact evidence as simply relevant to corroborate the victim's testimony, and recognizes that in such cases the evidence's probative value outweighs its prejudicial effect."⁹⁷ *Heuring* resolved the prob-

92. 513 So. 2d at 124.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Heuring*, 513 So. 2d at 124-25. Fennelly & Watson, *supra* note 91 at 58, recently urged that *Williams* Rule evidence be admissible in child sexual offenses to corroborate the victim's testimony and cite several other jurisdictions adopting this approach. However, these authors also urge a strict two prong test for admissibility. One weakness in their approach is their reliance on cases, such as *Wasko v. State*, 505 So. 2d 1314 (Fla. 1987), in which the centrally contested issue is identity. Yet as *Heuring* notes, identity is often not a real issue in child sexual battery cases. Fennelly and Wat-

lem of when *Williams* Rule can be used in child sexual battery by establishing an automatic rule of admissibility: assuming some similarity is shown between the collateral crime and the charged offense, the other crimes are admissible. *Heuring* thus allows *Williams* Rule evidence in these cases to show propensity, since the only way the other crimes evidence corroborates the present victim's testimony is when the jury believes that assuming the defendant committed the *previous* sexually batteries, he probably has committed the *presently* alleged batteries!

Heuring resolved a difficult question by choosing a bad solution. The Florida Supreme Court has dropped any pretext about other crimes evidence in child sexual battery not being used for propensity purposes. While the court's honesty is to be complimented, its solution is not. *Heuring* represents a judicial declaration that in child sexual battery cases, at least in a familial setting, Section 90.404(2)'s general exclusionary language does not apply. This is clearly contrary to Section 90.404(2)'s language which does not make any exception for *any* category of charges. Child sexual battery cases are emotional matters, and the problem of child sexual abuse strikes at society's heart. However, in *Heuring* the Florida Supreme Court produced an opinion which contains too much emotion and too little reasoning.⁹⁸

III. Witnesses

A. Anticipatory Rehabilitation

Whether and when a party may anticipate and meet beforehand an expected attack on the credibility of one of its witnesses without violating the prohibition against impeaching one's own witnesses has

son are apparently talking about corroboration of the victim's testimony that a particular person was the one who sexually battered the victim, not corroboration that a person whom the victim knew had sexually battered the victim.

98. For other recent cases involving other crimes evidence to show child sexual abuse see *In the Interest of C.G.*, 506 So. 2d 1131 (Fla. 2d Dist. Ct. App. 1987) (evidence that father had allegedly sexually abused minor child's half-sisters was admissible in a juvenile dependency proceeding to show lack of inadvertence and opportunity); *Ables v. State*, 506 So. 2d 1150, 1152 (Fla. 1st Dist. Ct. 1987) (stepdaughter's testimony that defendant sexually battered her when she was in the third to fifth grades was admitted to "prove a pattern of criminality" in a charge claiming the defendant sexually battered his niece).

been a major topic in Florida caselaw for the last several years.⁹⁹ Last year's survey noted the Florida Supreme Court's decision in *Bell v. State*¹⁰⁰ held that a party could on direct examination of its own witness expose that witness's prior inconsistent statements without violating the rule against impeaching one's own witness. The supreme court correctly concluded that eliciting this testimony "was not impeachment because it was not for the purpose of attacking the witness's credibility."¹⁰¹ Instead, the court recognized that this testimony is actually being offered tactically to steal the effect of an opponent's expected cross-examination¹⁰² or as the court aptly phrased it, "to take the wind out of the sails of a defense attack on the witness's credibility."¹⁰³

However, while sanctioning the use of anticipatory rehabilitation¹⁰⁴ as a trial technique, the Florida Supreme Court in *Bell* left open one serious issue. The court never addressed the question whether, and to what extent, a party can explain on direct examination as part of anticipatory rehabilitation, the reasons for the impeaching material's existence. Justice Barkett concurred in the court's opinion but argued anticipatory rehabilitation should be limited "to admitting only the prior inconsistent statement."¹⁰⁵ Her concern in establishing this limitation was avoiding what she called "the almost inevitable consequence of admitting evidence of a prior inconsistent statement, to-wit, the explanation therefor which may take the trial far afield from the issues to be decided."¹⁰⁶ Unless the cross-examiner also delved into the impeaching statements, Justice Barkett would not have allowed any explanation about them and then only on re-direct examination.¹⁰⁷

99. Each of the last two annual surveys has focused partially on this subject. For extended background discussion in this area, see Dobson and Braccialarghe, *Evidence: Survey of Florida Law 1985*, 10 NOVA L. REV. at 1073-74 and Dobson, *Evidence: Survey of Florida Law 1986*, 11 NOVA L. REV. at 1365-67.

100. 491 So. 2d 537 (Fla. 1986).

101. *Id.* at 538.

102. For a recent general discussion of such tactical moves see McElhaney, *Stealing Their Thunder*, 13 LITIGATION 59 (Spring 1987).

103. *Bell*, 491 So. 2d at 538.

104. Last year's survey credited the trial court in *Bell* with originating this term. However, as has since been graciously brought to the author's attention, the Second District Court of Appeal actually deserves the credit for coining the phrase. See *Bell v. State*, 473 So. 2d 734, 735 (Fla. 2d Dist. Ct. App. 1985). Letter from Hon. Richard R. Frank to the author (Nov. 4, 1987).

105. *Bell*, 491 So. 2d at 538 (Barkett, J., concurring).

106. *Id.* (Emphasis in Original.).

107. Justice Barkett's concurrence also suggested an alternative procedure to

Shortly after *Bell*, the Florida Supreme Court confronted a case forcing it to decide how far anticipatory rehabilitation should extend. *Lawhorne v. State*¹⁰⁸ involved anticipatory rehabilitation concerning a witness's prior convictions. Lawhorne was charged with theft, trespassing and resisting a police officer without violence. At trial, when Lawhorne took the stand in his own defense, his attorney elicited testimony on direct examination, without any objection, that Lawhorne had been previously convicted of six crimes. However when defense counsel asked whether Lawhorne had gone to trial in these cases, the state objected and the trial court sustained the objection. The Third District Court of Appeal affirmed Lawhorne's convictions¹⁰⁹ concluding that the "specifics of the defendant's six prior convictions were both untimely and improper".¹¹⁰

The Florida Supreme Court viewed *Lawhorne* as posing two different questions. The first was whether anticipatory rehabilitation should be allowed with respect to a witness's prior convictions. The court found this question had been settled by *Bell* and other cases approving anticipatory rehabilitation regarding prior inconsistent statements.¹¹¹

regularly admitting evidence of a witness's prior inconsistent statements on direct examination. In her view, an opponent should be allowed to waive use of the inconsistency. If this is done, she would not allow anticipatory rehabilitation, since the premise behind it no longer would exist as the other side does not plans to use the inconsistency to attack the witness's credibility.

108. 500 So. 2d 519 (Fla. 1986).

109. *Lawhorne v. State*, 481 So. 2d 19 (Fla. 3d Dist Ct. App. 1985).

110. *Id.* at 20. Unfortunately the district court's conclusion is somewhat puzzling given the opinion's language.

As the supreme court noted in its opinion "[t]he trial judge directed that there would be no questioning by either side about any of the details or the nature of the previous convictions." *Lawhorne*, 500 So. 2d at 520. On this basis no questions could ever be asked about the convictions' specifics. Thus the questions were improper without regard to when they would have been asked.

Yet even the district court admitted that "the defendant's position might have merit if the testimony sought to be elicited had come after the defendant had been impeached by the state with his prior convictions and defense counsel was seeking to rehabilitate." *Lawhorne*, 481 So. 2d at 20. On this rationale the questions were only untimely and not always improper.

Fortunately the Florida Supreme Court's decision make the ambiguities in the third district's opinion irrelevant.

111. Besides *Bell*, the Florida Supreme Court had found anticipatory impeachment regarding prior inconsistent statements proper in *Sloan v. State*, 491 So. 2d 276 (Fla. 1986) and *State v. Price*, 491 So. 2d 536 (Fla. 1986).

For another recent case, after *Lawhorne*, finding anticipatory rehabilitation re-

Once the supreme court found anticipatory rehabilitation generally permissible regarding prior convictions, the second question was how far the rehabilitation should be permitted to extend. According to the court, *Bell* and other cases implicitly found the witness should be allowed to explain why the prior inconsistent statements had been made even before there was any cross-examination about them. Thus, the supreme court declared that the "party presenting testimony may not only bring out impeaching information on direct examination to steal the thunder of the impeachment it is anticipated the other side will elicit on cross, but may attempt to 'reduce the harmful consequences' by explaining something about the nature or character of the damaging information."¹¹²

In *Lawhorne* the specific question became whether the attempted explanations for the six previous convictions was the type of allowable information contemplated. However, the supreme court phrased the question in more general terms: "whether the testimony sought to be presented, regardless of *when* it might be presented, was proper and permissible witness rehabilitation."¹¹³ The scope of permissible testimony during anticipatory rehabilitation is determined by examining the impeaching material in question and deciding how far proper rehabilitation may extend. Since the impeaching material in *Lawhorne* concerned prior convictions, the court examined what is proper rehabilitation in response thereto. Relying on past cases¹¹⁴, the court found that while a cross-examiner can only impeach by inquiring whether a witness has been previously been convicted of certain type crimes and their number, "the party presenting the testimony of the witness may delve into the nature or circumstances of the convictions for the purpose of rehabilitating the witness by attempting to diminish the effect of the disclosures."¹¹⁵ As to whether a conviction's circumstances included testimony that it was the result of a guilty plea, *Lawhorne* concluded

garding prior convictions proper *see Williams v. State*, 511 So. 2d 1017 (Fla. 2d Dist. Ct. App. 1987).

Although anticipatory rehabilitation is proper with respect to prior convictions, when a witness has never been convicted of an impeaching crime, counsel may *not* bring out this fact. *See Sudderth v. Ebasco Services, Inc.*, 510 So. 2d 320 (Fla. 4th Dist. Ct. App. 1987).

112. *Lawhorne*, 500 So. 2d at 521.

113. *Id.* at 521.

114. *See McArthur v. Cook*, 99 So. 2d 565 (Fla. 1957); *Noeling v. State*, 40 So. 2d 120 (Fla. 1949).

115. *Lawhorne*, 500 So. 2d at 522.

this was permissible rehabilitation.¹¹⁶ The court noted the state's inability to cite any authority supporting an adverse conclusion. Furthermore the court concluded that presenting such evidence as rehabilitation was not "an attempt to establish credibility on the ground of truthfulness on previous occasions"¹¹⁷ but rather "was simply to ameliorate the highly negative effect the knowledge of the past convictions was likely to have on the jury's perception of the defendant in terms of both his character and his credibility."¹¹⁸

The author disagrees with the court's answer to this question for two reasons. First and foremost, despite the supreme court's protestations to the contrary, *Lawhorne* allows the bolstering of a witness's character for truthfulness by specific act evidence. How else could the convictions' negative effects be negated by evidence of the previous guilty pleas if not by the notion that whenever Lawhorne was actually guilty he always admitted it so now that he is contesting the charges he must also be telling the truth and is not guilty. Second, *Lawhorne* ignores the problems inherent in judging any guilty plea's relevance. Once someone pleads guilty to a charge, the law treats this as an admission. However, does everybody who pleads guilty do so because they are just truthful people? Obviously the answer is no. *Lawhorne* seems to pose the very embodiment of Justice Barkett's fears about straying far from the main issues by allowing automatically certain types of rehabilitation.¹¹⁹ The court recognized the problems of introducing collateral issues by allowing this kind of rehabilitation¹²⁰ but dismissed them

116. In doing so, the court opinion's collected and briefly discussed previous Florida opinions on what information can be used to rehabilitate impeachment by a prior conviction. *Lawhorne* thus provides a useful quick summary of the law in this area for criminal attorneys and criminal trial court judges.

117. *Lawhorne*, 500 So. 2d at 523.

118. *Id.*

119. Ironically in light of her special concurrence in *Bell*, Justice Barkett concurs without opinion in *Lawhorne*.

For a recent article supporting Justice Barkett's position in *Bell*, see Rubin, *Anticipatory Rehabilitation: Softening the Blows of Inconsistent Statements and Prior Convictions*, 62 FLA. B.J. 15 (Jan. 1988). This article discusses the Florida caselaw on anticipatory impeachment and compares it with federal caselaw on this subject. The author argues "the practice should be limited to admitting the harmful 'fact' but not allowing the 'explanation' for the fact in advance of an attack of credibility." *Id.*

120. Indeed the court specifically noted that "[i]t is true that by attempting to rehabilitate a witness by having him testify that past convictions were obtained by pleas of guilty, a party opens the door somewhat to allow the other party to question the witness about the reasons for pleading guilty." *Lawhorne*, 500 So. 2d at 523.

as "not a sufficient reason to restrict a genuine attempt at rehabilitation"¹²¹ since trial courts can keep parties from straying too far.

Lawhorne is certainly an important case, well worth studying. The court's opinion firmly establishes anticipatory rehabilitation as a viable trial tactic for various types of impeaching material.¹²² However, the author believes it should not be read as broadly as the opinion suggests. For example, prior consistent statements are a proper rehabilitative response to impeachment with prior inconsistent statements. Yet *Lawhorne's* broad language notwithstanding, the Florida Supreme Court has recently declared that these statements are not admissible on direct examination to anticipate an expected impeachment by prior inconsistent statements.¹²³ *Lawhorne* should be strictly read as defining only what is proper rehabilitation for prior convictions and not for impeaching material in general.

IV. Privileges

A. Attorney-Client Privilege

Like all states, Florida recognizes a privilege for confidential communications between an attorney and a client or a prospective client which are made "in furtherance of the rendition of legal services to the client."¹²⁴ Most of the attorney-client privilege decisions during this survey period discussed rather common issues and set no new ground or important precedent.¹²⁵ However, one recent opinion discussing waiver

121. *Id.*

122. Although Florida cases allowing anticipatory impeachment have only concerned prior convictions and prior inconsistent statements, the author believes bias impeachment should receive the same treatment.

123. See *Jackson v. State*, 498 So. 2d 906, 909 (Fla. 1986).

124. FLA. STAT. § 90.502(1)(c) (1987).

125. See *Freedom Newspapers Inc. v. Egly*, 507 So. 2d 1180 (Fla. 2d Dist. Ct. App. 1987) (The attorney client privilege did not protect materials held by a Florida corporation specializing in estate planning under the theory that in devising an estate plan for corporate clients, the estate planning corporation acted under the advise and direction of the corporate clients' attorneys. The record did not show that the corporation was primarily retained to further enhance the provision of legal services so that the corporation would have acted as an extension of the corporate client's legal advisors); *Seminole County v. Wood*, 512 So. 2d 1000 (Fla. 5th Dist. Ct. App. 1987) (while the Public Records Act, FLA. STAT. § 119.01 *et seq.* (1987), recognizes a temporary exemption from disclosure of any public record which essentially contains an attorney's litigation strategy, see Section 119.07(3)(o), this exemption lasts only as long as the

of the attorney-client privilege, involves a case of first impression nationwide as well as in Florida.

Each privilege in the Florida Code contains specific exceptions where the privilege will not be recognized. Besides these situations, Florida statute section 90.507 establishes general principles governing when and how a privilege may be waived, either intentionally or unintentionally. This section provides in part that any confidential communication's holder "waives the privilege if he . . . voluntarily discloses or makes the communication when he does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication."¹²⁶ Although this section was not explicitly considered in *Visual Scene, Inc. v. Pilkington Brothers*,¹²⁷ the question of when a voluntary disclosure to a third party acts as a full or partial waiver of the attorney-client privilege, was at the heart of the Third District Court of Appeal's opinion.

Visual Scene involved a multi-party lawsuit attempting to determine who was at fault for a number of defective sunglasses Visual Scene had distributed throughout the country. Visual Scene sued three defendants, each of whom blamed the others for the defects and/or placed the blame for the defects on Visual Scene's alleged improper handling of the finished glasses. Visual Scene and one defendant, Metro, both blamed the other two defendants for supplying defective glass to Metro for processing. However, Visual Scene also claimed Metro had negligently processed the sunglasses, while Metro claimed Visual Scene improperly handled the finished product in its distribution. Before trial, Metro and Visual Scene shared information about the other two defendants alleged supplying of defective glass for processing. These defendants sought to discover documents memorializing the communications between Metro and Visual Scene. After the trial court found the attorney-client privilege did not protect this information, the Third District Court of Appeal reversed in a short but well

litigation is pending. Thus a county cannot claim an exemption from the Public Record Act's disclosure provisions for any closed litigation files).

126. FLA. STAT. § 90.507 (1987). Section 90.507's last sentence specifically provides it will not apply "when the disclosure is itself a privileged communication."

For a recent case briefly discussing Section 90.507, see *St. Paul Fire and Marine Insurance Co. v. Welsh*, 501 So. 2d 54 (Fla. 4th Dist. Ct. App. 1987) (Insurance company's production of letters from a consulting attorney in its claim file, without any privilege objection, waived any later claim that the attorney-client privilege protected the documents).

127. 508 So. 2d 437 (Fla. 3d Dist. Ct. App. 1987).

crafted opinion.

The third district recognized that “[i]n most cases, a voluntary disclosure to a third party of . . . privileged material, being inconsistent with the confidential relationship [of attorney and client], waives the privilege.”¹²⁸ However, the court noted that one exception to this general statement of what constitutes a waiver, is the so-called “joint defense” or “common interest” situation.¹²⁹ This exception allows parties with a common interest in a particular matter to exchange privileged information about it with the idea of promoting their mutual self-interests and still keeping the information privileged from others. The court thus considered the exception consistent with the basic rationale behind an attorney-client privilege of “allow[ing] clients to communicate freely and in confidence when seeking legal advice.”¹³⁰ The two defendants seeking discovery conceded that a “joint defense” exception to the general waiver rule existed but argued its inapplicability here, because *Visual Scene* and *Metro* were aligned on different sides of the case and were adversaries on the negligent processing and negligent distribution issues. The third district admitted the exception had never been applied when the parties involved a plaintiff and a defendant. However since no court had ever ruled on the common interest waiver exception’s application to such a scenario, *Visual Scene* thus presented a nation-wide case of first impression.

The third district declined to require that both parties be on the same side for the common interest exception to apply. Likewise, the court also refused to require complete mutuality of interests on all issues. On this second point, the third district noted that other cases recognized the exception where the parties were antagonistic on some claims or defenses.¹³¹ If there were some common interests on which the parties shared information, the attorney-client privilege would not be waived as long as sharing of information was confined to these common interests. The third district decided that whether the common interest exception to the general rule should apply in a particular case should depend on “whether the communication was ‘made and main-

128. *Id.* at 440.

129. For a general discussion of this situation, see S. STONE & R. LIEBMAN, *TESTIMONIAL PRIVILEGES* (1983), § 1.55, at 92-95.

130. *Id.*

131. See e.g., *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979) (co-defendants having a common interest in undermining a prosecution witness’s credibility did not waive the attorney-client privilege by sharing information in preparing for this witness’s cross-examination).

tained in confidence under circumstances where it is reasonable to assume that disclosure to third parties was not intended'.¹³² The court found this satisfied as the attorneys for Visual Scene and Metro had submitted an affidavit maintaining that a "before-the-exchange agreement . . .to maintain confidentiality and to use the information only in preparation for trial on those issues common to both"¹³³ existed and as sharing the information did not conflict "with any policy underlying the attorney-client privilege and merely facilitate[d] representation of the sharing parties by their respective counsel."¹³⁴

Visual Scene is undoubtedly a major case. More importantly, the third district's opinion reaches the correct result. The information was still confidential under Section 90.502(1)(c) because "it [was] not intended to be disclosed to third persons other than . . .[t]hose to whom disclosure [was] in the furtherance of the rendition of legal services to the client",¹³⁵ since both parties disclosed the information to mutually help each other. However, certain dicta in *Visual Scene* is troubling. The third district stated that "[q]uite obviously, when a member of the common interest group discloses this information to a non-member, a waiver of the privilege, as in the ordinary case, occurs."¹³⁶ However, this seems to conflict with Section 90.502(2)'s express declaration that "[a] client has a privilege . . .to prevent any other person from disclosing . . .confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client."¹³⁷ Under this section, clients who mutually share confidential information on a matter of common interest would seem able to prevent its unauthorized disclosure to third parties not possessing the same interest. Arguably the disclosure by one party of shared confidential information should only be a waiver as to that party alone. On this issue, *Visual Scene's* dicta raises serious questions.

132. *Visual Scene*, 508 So. 2d at 441, quoting in part from *In re LTV Securities Litigation*, 89 F.R.D. 595, 603-04 (N.D.Tex. 1981).

133. *Id.* Evidently this agreement had not been reduced to writing, since the parties only produced an affidavit swearing it existed. A better practice would be to reduce any such oral agreements to writing.

134. *Id.*

135. FLA. STAT. § 90.502(1)(c)1 (1987).

136. *Visual Scene*, 508 So. 2d at 440.

137. FLA. STAT. § 90.502(2) (1987).

B. *Privilege Against Self-Incrimination*

The United States and Florida constitutions both recognize a privilege against self-incrimination for all individuals.¹³⁸ Florida courts continue to recognize that the privilege's protection may properly be invoked whenever speaking may force the revelation of potentially incriminating information.¹³⁹ However, in civil actions, a party's assertion of the privilege can result in partial or complete dismissal of an action or a defense.¹⁴⁰ During the present survey period, the Florida Supreme Court decided two important cases concerning the Privilege against Self-Incrimination, one of which also received major attention in the

138. See U.S. CONST. amend. V and FLA. CONST. § 9, Declaration of Rights, which both partially provide that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

139. See *Johnson v. State*, 509 So. 2d 373, 373 (Fla. 4th Dist. Ct. App. 1987) ("[T]he privilege . . . is applicable in a probation revocation hearing as to specific conduct and circumstances concerning criminal conduct").

However the privilege should not be recognized when answering questions poses no realistic threat of criminal prosecution. See *M.S.S. by Blackwell v. DeMaio*, 503 So. 2d 1384 (Fla. 5th Dist. Ct. App. 1987) (After both the minor plaintiff's parents invoked their privilege against self-incrimination during depositions, the trial court improperly ordered them to answer questions about the mother's drug usage while pregnant or to face dismissal of plaintiff's medical malpractice claim. Since the questions did not relate to his own drug use, the father's testimony about the mother's drug use would not incriminate him. Furthermore, the mother's privilege claim should not have been sustained as the statute of limitations had likely run on any potential criminal charges against her. Thus the trial court was ordered to re-evaluate the two witnesses' privilege claims).

140. See *Rollins Burdick Hunter of New York, Inc. v. Euroclassics Ltd. Inc.*, 502 So. 2d 959, 962 (Fla. 3d Dist. Ct. App. 1987) (Trial court's failure to grant a defendant's motion to compel plaintiff's answers after the plaintiff's president and sole officer had asserted his privilege against self-incrimination was error. "While plaintiffs cannot be compelled to incriminate themselves, when seeking affirmative relief they may not use the same right to avoid answering pertinent questions and thereby prevail in a civil suit").

However, a party's mere assertion of the privilege does not automatically lead to a dismissal or other sanction. See *Sanford v. Sanford*, 508 So. 2d 516 (Fla. 4th Dist. Ct. App. 1987) (where a party invokes the privilege in response to a question which is "totally unrelated to the issues with respect to which the waiver [of the right to pursue a particular claim or defense] was claimed", sanctions against the invoking party are not appropriate).

Sanctions are only appropriate against a party. Thus a party should not be penalized when one of its witnesses invokes the privilege against self-incrimination. See *M.S.S. by Blackwell v. DeMaio*, 503 So. 2d 1384 (Fla. 5th Dist. Ct. App. 1987).

last survey.¹⁴¹

1. *General Scope of the Privilege Against Self-Incrimination*

Although the fifth amendment's text protects a person from being "compelled . . . to be a witness against himself,"¹⁴² there are many situations where an accused can be constitutionally forced to do something which supplies the state with incriminating information. While one purpose behind the Privilege against Self-Incrimination is "[t]o maintain a 'fair state-individual balance' . . . [and] to respect the inviolability of the human personality"¹⁴³ by requiring that the government

141. During the present survey period, the Florida Supreme Court also revisited a second case which received major attention in last year's survey. In *DeBock v. State*, 11 Fla. L. Weekly 550 (1986) (*DeBock I*), the Florida Supreme Court originally decided that a Florida Bar disciplinary proceeding "which could result in revocation of [an attorney's privilege to practice law] is tantamount to the disciplinary action [which an earlier case, *Florida State Bd. of Architecture v. Seymour*, 62 So. 2d 1 (Fla. 1952) involving potential revocation of an architect's license determined to be] a prosecution to affect the penalty or forfeiture as contemplated," *Id.* at 551, by the immunity statutes. The court's rationale for this finding was its conclusion that a person's "right to earn a living . . . [is] protected by the immunity statute." *Id.*, quoting *Seymour*, 62 So. 2d at 3. *DeBock I* concluded that an attorney who had not been immunized from disciplinary proceedings could refuse under the fifth amendment to answer depositions questions, because his answers might cause him to lose his right to practice law.

Shortly after *DeBock I*, the Florida Supreme Court granted the Florida Bar Association's motion for rehearing. See 14 Fla. Bar News, No. 4, (Feb. 15, 1987). Less than one year after its original decision, the Florida Supreme Court reversed its position. *DeBock v. State*, 512 So. 2d 164 (Fla. 1987) (*DeBock II*) found that once the state immunized *DeBock* from criminal prosecution, he could not refuse to answer until also immunized from any bar disciplinary proceedings. The supreme court's opinion hinges on its new conclusion that bar disciplinary proceedings are now not penal. *DeBock II* found that these disciplinary proceedings "are designed for the protection of the public and the integrity of the courts." *Id.* at 166. Since attorneys are court officers and occupy a special position of trust in our society, when they engage in unethical behavior "[n]ot only is the individual citizen harmed. . . [but] all of society suffers [because] confidence in our system of law and justice is eroded". *Id.* at 167. *DeBock II* thus concluded that bar disciplinary proceedings exist mainly for public protection and are remedial rather than penal in nature. *DeBock II* found past decisions hinting that bar disciplinary proceedings were penal and holding that the Florida immunity statute, FLA. STAT. § 914.04, also conferred immunity from professional disciplinary proceedings no longer applied since they were based on an earlier version of Section 914.04 and a misreading of the caselaw.

142. As mentioned previously, both the federal and Florida constitutions contain this language. See *supra* note 138.

143. *Schmerber v. California*, 384 U.S. 757 (1966), quoting in part *Miranda v.*

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"procure the evidence against an accused 'by its own independent labors'";¹⁴⁴ the United States Supreme Court has never been governed by a literal reading of the fifth amendment's language. Instead, the Court has consistently found that the privilege applies only when two components are present. There must be both some official compulsion on the accused,¹⁴⁵ and the compulsion must involve evidence of a testimonial or communicative nature.

As to what constitutes testimonial evidence, *Schmerber* distinguished between "compelling 'communications' or 'testimony' . . . [and] compulsion which makes a suspect or accused the source of 'real or physical evidence,'" ¹⁴⁶ to find that the withdrawal of blood from an accused was non-testimonial, as the driver's body merely acted as source of the evidence without requiring any further action on his part. Based on this rationale, compelled voice exemplars;¹⁴⁷ compelled hand writing samples;¹⁴⁸ compelled participation in a lineup;¹⁴⁹ compelled

Arizona, 384 U.S. 436, 460 (1966).

144. *Id.*

145. Whether official compulsion for Privilege against Self-Incrimination purposes exists has not usually been a major issue, since the presence or absence of compulsion is often self-evident. For example, in *Schmerber*, the Court had no problems finding the forcible extraction of blood taken over an accused's objections was compulsion.

Several terms ago the Court in *South Dakota v. Neville*, 459 U.S. 553 (1983) found no compulsion for fifth amendments purposes when a person arrested for driving under the influence rejected the opportunity to take a blood alcohol test and later had testimony about the rejection used against him. South Dakota law specifically required a driver in the defendant's situation to take the test at an arresting officer's request but also gave the driver a statutory right of refusal. The Court found "no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of the refusal." *Id.* at 562. The Court found Neville's choice to refuse uncompelled since while the state afforded him by law the chance to refuse, "the state did not directly compel [him] to refuse the test." *Id.* The mere fact South Dakota law forced Neville to make a choice between refusing or submitting did not constitute compulsion, since the state could have given Neville no choice at all. South Dakota law afforded Neville something to which he was not constitutionally entitled to, so he had no complaint when evidence of his refusal was used against him later in court.

For an excellent pre-*Neville* article discussing how the Court should resolve the case by finding a lack of compulsion for fifth amendment purposes see Arenella, *Schmerber and the Privilege against Self-Incrimination: A Reappraisal*, 20 AMER. CRIM. L. REV. 31 (1982).

146. 384 U.S. at 764.

147. *United States v. Dionisio*, 410 U.S. 1 (1973).

148. *United States v. Mara*, 410 U.S. 19 (1973).

149. *United States v. Wade*, 388 U.S. 218 (1967).

speaking for voice identification;¹⁵⁰ and compelled wearing of certain clothing¹⁵¹ have received Supreme Court approval over Privilege against Self-Incrimination objections. Given the apparent ease of applying *Schmerber's* test for determining what constitutes testimonial or communicative evidence, major cases involving this question seldom arise. However, recently in *Macias v. State*,¹⁵² the Florida Supreme Court found it necessary to explore this subject.

At Macias's trial for driving under the influence, the arresting officer testified about her slurred speech, bloodshot eyes and failure to successfully perform several field sobriety tests when arrested. At the state's request and over a defense objection, the trial court ordered Macias to say her name in open court so the officer could compare for the jury how she spoke when arrested with how she spoke in court. The trial court also ordered Macias to perform in court the same field sobriety tests that the officer had testified about giving her on the night in question. However the trial court would not let the officer make a comparison between the in-court performance and how Macias performed the same tests when arrested. After the defendant's conviction, the Broward County Circuit Court found that compelling the defendant to perform these in-court acts violated the fifth amendment. The Fourth District Court of Appeal reversed the circuit court,¹⁵³ concluding that making Macias state her name was not compelling evidence of a testimonial or communicative nature since "the words [she] was compelled to utter in court were used only to ascertain the physical properties of her voice and not for the content of what was said (only her name)."¹⁵⁴ Likewise, the fourth district found no constitutional violation in requiring the defendant to perform the field sobriety tests in the jury's presence as these acts were "by nature non-communicative."¹⁵⁵ Since Florida courts had previously found that requiring an arrestee to perform field sobriety tests did not violate the fifth amendment,¹⁵⁶ the court concluded that requiring an accused to perform the same tests in court likewise would not violate the fifth amendment. As the fourth district's

150. *Id.*

151. *Holt v. United States*, 218 U.S. 245 (1910).

152. 515 So. 2d 206 (Fla. 1987).

153. *State v. Macias*, 481 So. 2d 979 (Fla. 4th Dist. Ct. App. 1986).

154. *Id.* at 982.

155. *Id.*

156. *See State v. Edwards*, 463 So. 2d 551 (Fla. 5th Dist. Ct. App.) *rev. denied*, 471 So. 2d 43 (Fla. 1985); *County of Dade v. Callahan*, 259 So. 2d 504 (Fla. 3d Dist. Ct. App. 1971) *cert. denied*, 265 So. 2d 50 (Fla. 1972).

decision conflicted with another district court's interpretation of what constituted testimony,¹⁵⁷ the Florida Supreme Court had jurisdiction to resolve the dispute.

The Florida Supreme Court agreed with the fourth district's resolution of both issues. The United States Supreme Court had approved the compelled giving of voice exemplars in grand jury investigations,¹⁵⁸ and Florida had previously required defendants to speak for voice identification in the jury's presence.¹⁵⁹ The Florida Supreme Court saw no meaningful difference for fifth amendment purposes between these two situations and requiring a defendant to speak so a witness could compare the quality of the witness's voice with how it was at an earlier time. As for requiring the in-court performance of field sobriety tests, the supreme court also found these non-communicative since "[s]uch actions, made when she was fully sober, did not infer that Macias was drunk on the night she was arrested."¹⁶⁰ The court noted there might have been a relevancy objection to having Macias perform the field sobriety tests but found this waived by lack of any relevancy objection. All previous district court opinions conflicting with *Macias*¹⁶¹ were specifically disapproved.

Although the supreme court did not discuss the propriety of having the arresting officer make a comparison of the accused's voice quality on the two occasions, the court apparently found no problem with this testimony. This is not surprising since in many drunk driving cases the jury is indirectly provided a quality of voice comparison through video tape evidence. Even more than voice comparisons, video tapes of a drunk driving arrestee performing field sobriety give the jury some idea of an accused's physical condition when arrested or shortly afterwards. Given *Macias*, the trial court's ruling prohibiting the arresting

157. See *Machin v. State*, 213 So. 2d 499 (Fla. 3d Dist. Ct. App.), *cert. denied*, 221 So. 2d 747 (Fla. 1968) (defendant's request to demonstrate his running ability to jury without subjecting himself to cross-examination was denied, since the court found the demonstration would be testimonial); *Wells v. State*, 468 So. 2d 1087 (Fla. 3d Dist. Ct. App. 1985) (defendant's display of tatoos would have been testimonial evidence).

158. See *Unites States v. Dionisio*, 410 U.S. 1 (1973).

159. See *Lusk v. State*, 367 So. 2d 1088 (Fla. 3d Dist. Ct. App. 1979).

160. *Macias*, 515 So. 2d at 208.

161. See *Machin v. State*, 213 So. 2d 499 (Fla. 3d Dist. Ct. App.), *cert. denied*, 221 So. 2d 747 (Fla. 1968) (defendant's request to demonstrate his running ability to jury without subjecting himself to cross-examination was denied, since the court found the demonstration would be testimonial); *Wells v. State*, 468 So. 2d 1087 (Fla. 3d Dist. Ct. App. 1985) (defendant's display of tatoos would have been testimonial evidence).

officer from comparing how the defendant performed field sobriety tests when arrested and when performing the same tests fully sober in court is probably wrong. Since the supreme court found a possible relevancy objection to the in-court performance of the field sobriety tests, the court's relevancy concerns should be fully satisfied by such a comparison. This comparison would directly relate how the defendant performed the in-court tests to the accused's actions when the alleged offense was committed. If the trial court committed any error concerning the in-court tests, the error was probably in Macias's favor, since without the arresting officer's comparison testimony the jury probably would have difficulty in evaluating the probative worth of the in-court tests.¹⁶²

2. *Privilege Against Self-Incrimination and Documentary Evidence*

As criminal investigations delve into more complicated crimes, the need for obtaining documentary evidence increases. Grand jury subpoenas are common devices for obtaining documentary evidence. Unlike a search warrant which must be based upon probable cause, a grand jury subpoena may be issued without any showing of justification or need. Privilege against self-incrimination problems concerning the issuance of and response to these subpoenas seem to be increasing. In *State v. Wel-*

162. Justice Barkett dissented in *Macias* on fifth amendment grounds, because she believed *Schmerber* and other cases only allowed "various kinds of *objective* physical evidence . . . [to] be compulsorily extracted from a suspect without violating the privilege against self-incrimination." *Macias*, 515 So. 2d at 209. In her view, a demonstration to show how someone usually looks involves a "necessarily *subjective* [display] and goes beyond making the accused merely the source of real or physical evidence." *Id.*

The author disagrees with this position. Virtually all evidence or testimony is subject to some sort of *subjective* determination. For example, forcing an accused to recite in court the words which a masked bank robber uttered during a crime so that a witness might identify the defendant as the perpetrator involves a subjective determination on the witness's part that the two speakers are one and the same person because of their voice similarities. Lay witness voice identification is not an *objective* science, yet courts have consistently compelled defendants to speak thusly and allowed witness to offer comparison testimony.

What may have been troubling Justice Barkett is the relative uncertainty of voice quality comparisons as opposed to blood tests and fingerprint comparison. If so, this concern goes not to the information's admissibility but to its weight.

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lington *Precious Metals, Inc.*¹⁶³ the state had issued an investigative subpoena *duces tecum* demanding the corporation's records involving its acquisitions of certain precious metals. The subpoena did not personally name Daniel Weiss, Wellington's sole shareholder and corporate custodian, as the required respondent, but he nevertheless filed a motion to quash, claiming the act of production would be self-incriminating. The trial court agreed that a custodian of corporate records has a right to assert the fifth amendment privilege where compelling production of those records would be self-incriminating and quashed the subpoena. The Third District Court of Appeal agreed with the trial court's decision holding that "a sole owner-corporate custodian of records . . . may not be compelled to produce corporate records pursuant to a subpoena *duces tecum* . . . if the act of producing will be communicative and incriminatory, in absence of a grant of use immunity."¹⁶⁴ However, the Florida Supreme Court reversed in a major decision concerning the scope of the Fifth Amendment Privilege against Self-Incrimination.

The Florida Supreme Court's decision revolved around its interpretation of two major U.S. Supreme Court cases. *Fisher v. United States*¹⁶⁵ had established that the fifth amendment does not protect the contents of voluntarily created business records. *Fisher* recognized, however, that the act of producing these documents "has communicative aspects of its own, wholly aside from the contents of the papers produced."¹⁶⁶ Thus in some circumstances, the contents of certain documents will not be privileged although the act of producing them will be protected. Despite *Fisher*'s language, the United States Supreme Court has consistently found that a custodian of corporate records generally has no privilege to refuse producing them, even though their contents may be self-incriminating.¹⁶⁷ This is based on a theory that a custodian by agreeing to assume responsibility for corporate records waives his personal fifth amendment privilege regarding them. Following *Fisher*, *United States v. Doe*¹⁶⁸ reaffirmed two important aspects concerning the privilege against self-incrimination and production of

163. 510 So. 2d 902 (Fla. 1987).

164. *State v. Wellington Precious Metals, Inc.*, 487 So. 2d 326, 327-28 (Fla. 3d Dist. Ct. App. 1986).

165. 425 U.S. 391 (1976).

166. *Id.* at 410.

167. See *Wilson v. United States*, 221 U.S. 361 (1911).

168. 465 U.S. 605 (1984).

documentary evidence. *Doe* involved the question "whether, and to what extent, the Fifth Amendment privilege against compelled self-incrimination applies to the business records of a sole proprietorship."¹⁶⁹ *Doe* reiterated that "[w]here the preparation of business records is voluntary, no compulsion is present."¹⁷⁰ However, *Doe* found that while a document's contents may not be privileged, its production might be. The Court recognized that "a subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect."¹⁷¹ In *Doe*, the government had subpoenaed records of five sole proprietorships. Since producing these documents may have actually authenticated them for purposes of trial, the Court found the act of production privileged, although the document's contents were not. *Doe* distinguished between a sole proprietorship's records and those of a corporation. As the Court felt that records of a sole proprietorship were really the proprietor's personal records, the proprietor could still assert his personal privilege against self-incrimination for the act of production.¹⁷²

Unlike *Doe*, *Wellington* involved an attempt to subpoena a one-man corporation's records versus those of a sole proprietorship. Several United States Supreme Court decisions have held that the fifth amendment only protects a person from compelled self-incrimination and does not protect corporations or other collective entities.¹⁷³ The Florida Supreme Court distinguished *Doe* from *Wellington* on two bases. First, in *Doe*, the government addressed the subpoena to the sole proprietor personally while *Wellington* involved a subpoena addressed to a corporate

169. *Id.* at 606.

170. *Id.* at 610.

171. *Id.* at 612.

172. For a more in-depth discussion of *Doe*, see Webb & Ferguson, *United States v. Doe: The Supreme Court and the Fifth Amendment*, 16 LOY. L. REV. 729 (1985). The authors claim three theories support the Privilege against Self-Incrimination: "(1) the truth seeking rationale, (2) the individual dignity rationale; (3) the privacy rationale." *Id.* at 743. They conclude the Court's determination that any voluntarily created documents are within the privilege's protection is consistent with the truthfulness rationale since "if the records are created voluntarily—if they are not the product of governmental compulsion—their reliability is not open to questions, and there is no reason to exclude them from evidence," *Id.* at 751. The authors do not try to find any justification for *Doe's* testimonial act of production holding but merely claim this is "inconsistent with truth-seeking rationale." *Id.* at 752, n.126.

173. See e.g., *Bellis v. United States*, 417 U.S. 85, 88 (1974) which defined a collective entity as "an organization which is recognized as an independent entity apart from its individual members."

custodian in his representative capacity. As the subpoena "did not require that [the custodian] personally produce and authenticate the corporate records",¹⁷⁴ he could personally claim no fifth amendment privilege against self-incrimination in his capacity as a corporate officer. Secondly, *Doe* involved a sole proprietorship's records while *Wellington* involved corporate records. Although Reiss was the the corporation's sole shareholder, this did not allow him to assert his privilege against self-incrimination to avoid producing the records. Under Florida law, corporations are considered separate entities from individuals and thus are distinguishable from sole proprietorships. Corporate custodians waive their own personal privilege against self-incrimination by assuming their corporate office, while sole proprietors do not waive their privilege because of their positions. The Florida Supreme Court therefore held "that the subpoena duces tecum placed the burden on the corporation and its officers to timely produce and authenticate the corporate records, and that Reiss, as an individual, had no standing to challenge the subpoena."¹⁷⁵

Wellington noted that courts differ on whether a corporate officer can personally claim the privilege against self-incrimination to avoid producing corporate records subpoenaed from him in his representative capacity.¹⁷⁶ The United States Supreme Court recently heard arguments on this issue late in its 1987 term.¹⁷⁷

V. Expert Testimony

The recent Florida opinions on expert witness testimony once again did not break any significant ground. Unless it involved a subject considered beyond an average juror's normal understanding, Florida courts consistently prohibited expert testimony.¹⁷⁸ Florida appellate

174. *Wellington*, 510 So. 2d at 905.

175. *Id.* at 906.

176. For cases reaching a different conclusion on this issue than *Wellington* see *United States v. Antonio Sancetta, M.D., P.C.*, 788 F.2d 67 (2d Cir. 1986); *United States v. Lang*, 792 F.2d 1235 (4th Cir. 1986); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985).

177. See *In re Grand Jury Proceedings (Doe)*, 814 F.2d 190 (5th Cir. 1987) cert. granted sub nom., *Braswell v. United States*, 108 S. Ct. 64 (1987).

178. See FLA. STAT. § 90.702 (1987); *Ortagus v. State*, 500 So. 2d 1367, 1371 (Fla. 1st Dist. Ct. App. 1987) (trial court properly excluded a firearm expert's testimony about the distance between a homicide victim and the accused when a fatal shot was fired, since other evidence amply established this fact and it "was not beyond the

courts continued to give great deference to a trial court's heavily fact-bound determination whether a witness should be allowed to testify as an expert witness on a particular matter.¹⁷⁹ Experts were also allowed to continue giving their opinions even though the matters in concern involved testimony on the ultimate issue.¹⁸⁰ Likewise, experts were also allowed to base their opinions upon information reasonably relied in their respective fields of expertise, even though the information might

common understanding of the average layman"); *Andrews v. Tew*, 512 So. 2d 276 (Fla. 2d Dist. Ct. App. 1987) (trial court properly admitted an expert reconstructionist's opinion on a car's speed when it hit a child, based upon the expert's visit to the accident scene two years after the accident and his measurements of the still present skid marks from the defendant's car, since the expert's specialized knowledge and testimony could have helped the jury determine the car's speed when the accident happened).

179. See FLA. STAT. 90.702 (1987); *Van Sickle v. Allstate Insurance Co.*, 503 So. 2d 1288 (Fla. 5th Dist. Ct. App. 1987) (an expert orthopedic doctor should not automatically be excluded from testifying on the reasonableness of chiropractic care even though the two areas of medicine are not the same, since in a particular case an orthopedic doctor may have sufficient knowledge to testify as an expert about chiropractic care); *Rose v. State*, 506 So. 2d 467 (Fla. 1st Dist. Ct. App. 1987) (trial court abused its discretion in disqualifying a witness who had a master's degree in clinical psychology and who had administered several tests to the accused at a licensed psychologists's direction from testifying as an expert about whether an accused suffered from episodic dyscontrol syndrome, since the basis for the disqualification rested on the witness not being licensed in Florida as a psychologist. Section 90.702 permits a person to be qualified as an expert by "knowledge, skill, experience, training or education," FLA. STAT. § 90.702 thus "a witness need not have a specific degree or license in order to testify as an expert." 506 So. 2d at 470).

180. See FLA. STAT. § 90.703 (1987); *Bloodworth v. State*, 504 So. 2d 495 (Fla. 1st Dist. Ct. App. 1987) (the trial court did not err in a sexual battery case when it allowed an expert obstetrician and gynecologist who had examined the victim to offer his opinion that she recently had nonconsensual intercourse); *American Automobile Association v. Tehrani*, 508 So. 2d 365, 369 (Fla. 1st Dist. Ct. App. 1987) (In a case arising from a collision between plaintiffs' car and a defendant service station's wrecker, the trial court erred in prohibiting the service station owner from testifying about the relationship between his station and defendant AAA. One of the main issues was whether the service station was an independent contractor or an agent of AAA. "In determining the relationship of the parties and whether one is an agent, servant or employee or whether he is an independent contractor, testimony by the parties as to the nature of the relationship is admissible" *Id.*); *In re Estate of Lenahan*, 511 So. 2d 365 (Fla. 1st Dist. Ct. App. 1987) (Expert testimony from the lawyer who drafted a decedent's will about who would be liable for payment of estate taxes under the will was not excludable because it concerned the ultimate legal issue, since the testimony was given to help the trial court concerning a complicated legal issue. However, the testimony should have been excluded on parol evidence grounds).

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not be separately admissible.¹⁸¹ Finally, Florida continued to take a conservative view towards expert witnesses' use of learned treatises on direct examination.¹⁸²

Although there were no major Florida cases concerning experts or new forms of scientific evidence, the United States Supreme Court, in a rare excursion into the area of scientific evidence, delivered an opinion which may be of immense significance.

A. *Compulsory Process and the Admissibility of Novel Scientific Evidence*

In a criminal case, both the United States and Florida constitutions guarantee an accused the right to subpoena witnesses to testify for the defendant.¹⁸³ The United States Supreme Court has construed the Compulsory Process Clause as affording an accused the right to present a defense free from arbitrary and unreasonable state evidentiary rules.¹⁸⁴ The Court has accordingly declared unconstitutional

181. See FLA. STAT. § 90.704 (1987); *Robinson v. Hunter*, 506 So. 2d 1106 (Fla. 4th Dist. Ct. App. 1987) (a testifying orthopedic surgeon's opinion about the plaintiff's degree of permanent injury was properly based in part upon another doctor's unadmitted thermogram report since the testifying doctor was familiar with thermograms and regularly used them as diagnostic tools); *Hungerford v. Mathews*, 511 So. 2d 1127 (Fla. 4th Dist. Ct. App. 1987) (Florida doctor who examined the plaintiff for trial testimony purposes only properly relied on medical records from the plaintiff's treating out-of-state doctor in arriving at his conclusion about a knee injury's source).

182. See FLA. STAT. § 90.706 (1987); *Quarrel v. Minervini*, 510 So. 2d 977, 978 (Fla. 3d Dist. Ct. App. 1987) ("Medical treatises cannot be used to bolster the testimony of a physician on direct examination").

The Federal Rules of Evidence allow learned treatises to be used both substantively and for impeachment. See FED. R. EVID. 803(18). In contrast, FLA. STAT. § 90.706 (1987) allows use of learned treatises on cross-examination only. For a general discussion of this subject, see McElhaney, *Learned Treatises*, 12 LITIGATION 39 (Spring 1986).

183. U.S. CONST. amend. VI states in part that: [i]n all criminal prosecutions, the accused shall have the right . . . to have compulsory process for obtaining witnesses in his favor . . ." Fla. Const. art. I, § 16, Declaration of Rights, states in part that: "[i]n all criminal prosecutions the accused . . . shall have the right to compulsory process for witnesses. . . ."

184. In *Washington v. Davis*, 388 U.S. 14 (1967), the Court found the rights guaranteed by the Compulsory Process Clause against federal government action were equally applicable as a protection against state action. According to the Court, "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the

state procedural rules prohibiting accomplices from testifying on one another's behalf but not from testifying for the state,¹⁸⁵ and state evidentiary rules prohibiting both certain hearsay statements and impeachment of one's own witness.¹⁸⁶ Most of the Court's Compulsory Process Clause decisions have not had as large an impact as initially expected.¹⁸⁷ However, the Court's decision in *Rock v. Arkansas*¹⁸⁸ may

truth lies." *Id.* at 19.

185. See *Washington v. Davis*, 388 U.S. 14, 23 holding that such a state statute violated a defendant's compulsory rights since it "arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to the events that he had personally observed, and whose testimony would have been relevant and material to the defense."

186. See *Chambers v. Mississippi*, 410 U.S. 284 (1973) where the Court reversed a defendant's murder conviction when a Mississippi trial court excluded statements of a third party who admitted the killing. Under existing Mississippi law, a party could not impeach his own witness. The witness had confessed to the shooting but recanted his confession at trial; but under Mississippi's "voucher" rule, Chambers was unable to impeach him with his prior inconsistent statements. Chambers then sought to call other persons to whom the witness admitting the shooting; but since Mississippi recognized only declarations against pecuniary interests, the statements were inadmissible hearsay under state evidence rules.

The Court first found Mississippi's voucher rule rested on out-dated assumptions about the trial process. At common law, when parties had the ability to select those witnesses who would testify on their behalf, the rule perhaps made sense. However, the Court found that in modern criminal trials, selection of witnesses is rarely possible. Parties now "must take [their witnesses] where they find them." *Id.* at 296. The Court then found that Mississippi's hearsay rules prevented Chambers from offering testimony of other persons about the witness's admission to the killing which "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest." *Id.* at 302. The witness had made three oral confessions and later signed a written confession which was repudiated. Additionally, there was independent evidence from other witnesses that the witness had in fact done the shooting. Under these facts, the Court held the combination of Mississippi's voucher and hearsay rules deprived Chambers of a fair trial and violated his due process rights.

187. *Chambers* is the best example of this. State courts seem to be especially adept at narrowly confining *Chambers* to its precise facts and repeatedly reject it as a basis for successful challenges to trial court evidentiary rulings. See e.g., *State v. Palmer*, 8 Kan. App. 2d 1, 657 P.2d 1130 (1982), rejecting the argument of a defendant charged in a stabbing case that *Chambers* required admission of a hearsay statement, accepting responsibility for the stabbing, made by one of Palmer's friends, who refused to testify at trial, shortly after the incident.

For an article discussing the impact of *Chambers*, see Churchwell, *The Constitutional Right to Present Evidence: Progeny of Chambers v. Mississippi*, 19 CRIM. LAW BULL. 131 (1983).

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have a major influence on the admission of scientific testimony in criminal cases.

The state charged Rock with manslaughter stemming from the shooting death of her husband during an argument. Besides the two, no one else was present when the shooting occurred. After police arrived, they found the victim on the floor with a chest wound. Rock begged the police to help save her husband, and according to two police officers, gave them conflicting versions about how the shooting occurred.¹⁸⁹ When Rock could not remember all the shooting's details, her counsel had a licensed neuropsychologist with experience in hypnosis hypnotize her twice. The neuropsychologist interviewed Rock before the first hypnotic session, took notes on what Rock remembered about the shooting and recorded both sessions on tape. Rock did not relate any new information while under hypnosis, but afterwards she remembered that when the shooting occurred her thumb was on the gun's hammer but her finger was not on the trigger. The defendant also recalled the gun went off when her husband grabbed her arm. After hearing these details, defense counsel had a firearms expert inspect the handgun involved. The inspection revealed a defective gun prone to discharge when hit or dropped without the trigger being pulled. Before trial, the state moved to exclude the defendant's testimony. After a pre-trial hearing, the trial court excluded all hypnotically refreshed testimony, although Rock was allowed to testify about what she remembered before being hypnotized. After the jury convicted Rock of manslaughter, the Arkansas Supreme Court affirmed her conviction,¹⁹⁰ but the United States Supreme Court granted certiorari "to consider the constitutionality of Arkansas' *per se* rule excluding a criminal defendant's hypnotically refreshed testimony."¹⁹¹

Rock's argument for reversal focused on her constitutional right to testify in her own defense. The Court decided three separate constitutional bases supported this argument. First, the Court found that an accused's right to testify in his/her own defense was a fundamental right constituting an essential ingredient of Due Process of Law. Secondly, the Court found the sixth amendment's Compulsory Process

188. 107 S. Ct. 2704 (1987).

189. One officer claimed Rock said the gun fired accidentally when her husband hit her. Another officer claimed Rock told him she purposely shot her husband after he had choked and hit her several times. *Id.* at 2706.

190. See *Rock v. State*, 288 Ark. 566, 708 S.W. 2d 78 (1986).

191. *Rock*, 107 S. Ct. at 2708.

Clause also guaranteed an accused the right to testify, since the clause guarantees an accused the right to present the defense. Unless an accused could testify and directly repudiate the criminal charges against him/her, the right to present a defense would necessarily be incomplete. As *Rock* noted "the most important witness for the defense in many criminal cases is the defendant himself."¹⁹² Finally, the Court found that a defendant's right to testify was a "necessary corollary to the fifth amendment's guarantee against compelled testimony."¹⁹³ Since an accused has a privilege not to speak unless choosing to do so, there must necessarily be a corresponding right to testify when one wishes. However, *Rock* stopped short of declaring that an accused has an absolute right to testify whenever and however a defendant wishes. The Court recognized there may be valid restrictions on the defendant's right to testify but these restrictions "may not be arbitrary or disproportionate to the purposes they are designed to serve."¹⁹⁴ *Rock* accordingly mandated a balancing test which must be applied on a case-by-case basis. Whenever a state procedural or an evidentiary rule limits an accused right to testify, a trial court "must evaluate whether the interests served by the rule justify the limitation imposed".¹⁹⁵ If not, then the defendant must be allowed to present the evidence desired regardless of the rule's specific prohibiting language.

Failure to apply this case-by-case balancing approach caused the reversal of *Rock*'s murder conviction. Since Arkansas had propagated a *per se* rule against admission of any post-hypnotic testimony, this did not "allow a trial court to consider whether post hypnosis testimony may be admissible to particular case."¹⁹⁶ Many other states had previously adopted *per se* rules excluding all post-hypnotic testimony. However, the Court noted that all states adopting absolute exclusionary rules did so for the testimony of ordinary witnesses, not the defendants. Examined with this difference in the mind, the Arkansas Supreme Court's *per se* rule was extremely detrimental to an accused's Sixth Amendment rights, since it applied to "any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information

192. *Id.* at 2709.

193. *Id.* at 2710.

194. *Id.* at 2711.

195. *Id.*

196. *Id.*

it produced."¹⁹⁷ Here the firearms expert had partially corroborated Rock's version of the shooting. Additionally, the tape recordings provided a basis to evaluate both hypnotic sessions. The Court found that "those circumstances present[ed] an argument for admissibility of [Rock's] testimony in this particular case, an argument that *must* be considered by the trial court."¹⁹⁸

Despite *Rock's* apparent indorsement of a case-by-case balancing approach for considering when a state evidentiary rule may unconstitutionally infringe upon a defendant's right to present evidence or testify, the Court's decision is a perplexing one. Before affirming the trial court's exclusion of Rock's post-hypnotic recollections, the Arkansas Supreme Court had carefully reviewed the various approaches toward the admissibility of hypnotically refreshed testimony. That court noted that while most courts had held hypnotically induced testimony admissible, "[t]he most recent trend is toward exclusion of such testimony."¹⁹⁹ The state supreme court admitted that hypnosis may in theory aid a criminal investigation, but noted many experts believed it was too dangerous for use as a memory retrieval device. The United States Supreme Court's decision in *Rock* did not disagree with the Arkansas Supreme Court general conclusions about hypnosis. Indeed Justice Blackmun's majority opinion noted that "[t]he use of hypnosis in criminal investigations . . . is controversial, and the current medical and legal view of its appropriate role is unsettled."²⁰⁰ The Court recognized that individuals can react differently to hypnosis and that while "hypnosis often has no effect at all on memory,"²⁰¹ it may produce "an increase of both correct and incorrect recollections."²⁰² Furthermore, while the Court suggested certain procedural safeguards may reduce the danger of hypnosis, the Court did not "indorse without qualifications the use of hypnosis as an investigative tool; [since] scientific understanding of phenomenon and of means to control the effects of hypnosis is still in its infancy."²⁰³ Additionally, the Court did not disagree with the Arkansas Supreme Court's conclusion about the dangers of hypnotically refreshed testimony. Despite this lack of disagreement,

197. *Id.* at 2708.

198. *Id.* at 2714 (emphasis added.).

199. *Rock*, 288 Ark. at 568, 708 S.W.2d at 80.

200. 107 S. Ct. at 2713.

201. *Id.*

202. *Id.*

203. *Id.* at 2714.

Justice Blackmun asserted that "Arkansas . . . has not justified the exclusion of *all* of a defendant's testimony that the defendant is unable to prove to be the product of post-hypnosis memory."²⁰⁴ Wholesale exclusion was wrong, because the state "has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of events for which she is on trial."²⁰⁵

What does *Rock* signal for the future? Certainly the Court's decision indicates that while hypnosis as a memory refreshing tool has not been universally accepted, trial courts cannot exclude a defendant's post-hypnotic recollected testimony except on a case-by-case basis. As a practical matter the Court, whether intentionally so or not, has taken the position that some hypnotically refreshed testimony must be considered reliable, even though not all may be. *Rock* forces all jurisdictions previously adopting a *per se* rule excluding testimony about events remembered only after hypnosis to reevaluate their positions.²⁰⁶ The

204. *Id.* (Emphasis in Original).

205. *Id.*

206. Ironically, Arkansas still has not clarified its post-*Rock* position towards admission of hypnotically refreshed testimony. Following remand from the United States Supreme Court, the Arkansas Supreme Court, in a one paragraph order providing no guidance on what approach should be taken towards the issue, remanded *Rock* to the trial court for further proceedings. The trial court never had to resolve the issue, since the defendant accepted the state's plea offer to a charge of manslaughter with a sentence of three years. Telephone interview with James M. Luffman, Counsel for Vicki Lorene Rock (March 15, 1988).

Other jurisdictions have reconsidered their position on admission of hypnotically refreshed testimony. Several have read *Rock* as being strictly limited to its facts. In *People v. Zayas*, 159 Ill. App. 3d 554, 510 N.E.2d 1125 (1987), the First District Appellate Court of Illinois refused to allow the hypnotically refreshed testimony of a witness in a criminal trial "because of the fundamental problems of reliability inherent in such testimony." *Id.* at 562, 510 N.E.2d at 1134. The court acknowledged that *Rock* might require a different result if the defendant's testimony had been involved but left "for another day the question of how Illinois will accommodate a defendant's right to testify in such circumstances." *Id.* *Rault v. Butler*, 826 F.2d 299 (5th Cir. 1987) refused to find error in a trial court's denial of a defendant's request to give testimony while under hypnosis to demonstrate his mental condition and to provide a basis for the jury to evaluate a defense expert's conclusion that Rault was insane at the time of a murder. The fifth circuit regarded "*Rock* as wholly inapplicable to this case," *Id.* at 303, since Rault never claimed he could not remember the event's details and also since "testimony while in a state of hypnosis presents completely different considerations from testimony while in a normal state although having been previously hypnotized."

United States Supreme Court's opinion indicated certain procedures could enhance the likelihood that hypnotically refreshed testimony would be reliable. Specifically, the Court suggested that the hypnotist be a trained independent expert, that the hypnosis be conducted in a neutral setting, that only the subject and hypnotist be present during the hypnosis session and that all contact between the hypnotist and the subject be recorded. Assuming these or comparable procedures are followed, *Rock* poses the serious question whether hypnotically refreshed testimony of any witness, not just the defendant, should be admissible. Florida has taken a *per se* exclusionary approach towards all hypnotically refreshed testimony.²⁰⁷ *Rock* obviously forces Florida to adopt a new approach towards this issue when a criminal defendant wants to testify, but should *Rock* also extend to all witnesses whose testimony has been hypnotically refreshed?²⁰⁸ If so, then *Rock* while ostensibly a pro-defense decision will ultimately become a prosecution windfall, since most often the state will be the party wishing to offer such testimony.

VI. Hearsay

During this survey period, a substantial number of cases once again discussed some feature of the hearsay rule or its exceptions. Indeed, there were more cases discussing hearsay related issues than any other aspect of evidence law. As with other evidence areas, not every case was significant or interesting. For completeness and as a quick reference for readers, the author notes that the following hearsay topics received minor attention in recent cases: prior consistent statements;²⁰⁹

Id.

207. See *Bundy v. State*, 471 So. 2d 9, 18 (Fla. 1985) holding "that hypnotically refreshed testimony is *per se* inadmissible in a criminal trial . . . but hypnosis does not render a witness incompetent to testify to those facts demonstrably recalled prior to hypnosis."

208. One recent court, *Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1987) citing *Rock*, refused to find constitutional error in the use of hypnotically refreshed testimony of a prosecution witness when appropriate safeguards are present. A second court, *State v. Pollitt*, 205 Conn. 61, 530 A.2d 155 (1987), noted the suggested *Rock* safeguards but found it unnecessary to decide whether *Rock* would allow the hypnotically refreshed testimony of a state witness, since here the hypnosis did not enhance the witness's memory.

209. See FLA. STAT. § 90.801(d)(2)(b)(1987); *Smelley v. State*, 500 So. 2d 318, 321 (Fla. 1st Dist. Ct. App. 1986) ("[A] witness's trial testimony may not be corroborated or "bolstered" by his or her own prior consistent statement." However, once a

spontaneous statements;²¹⁰ excited utterances;²¹¹ statements of then existing conditions;²¹² business records exception;²¹³ public records excep-

robbery victim's credibility was attacked on cross-examination, statements which the victim made immediately after the robbery to a motorist became admissible); (Nussdorf v. State, 508 So. 2d 1273 (Fla. 4th Dist. Ct. App. 1987) (since the prior consistent statement which the trial court admitted was made months before the conversations the defense had cross-examined the witness about, there was no basis for the defendant's claim these had been made after the alleged undue influence occurred).

210. See FLA. STAT. § 90.803(1) (1987); *Smelley v. State*, 500 So. 2d 318, 322 (Fla. 1st Dist. Ct. App. 1986) (a robbery victim's statement made to a motorist right after the victim ran from the robber were spontaneous statements "since the record reflects the victim's statement . . . was made immediately after she escaped from her assailant. . . and within minutes of the robbery"); *Jano v. State*, 510 So. 2d 615 (Fla. 4th Dist. Ct. App. 1987) (child's statements to various people about her father's sexually abusive treatment should not have been admitted as spontaneous statements where the state did not show the time between the incidents allegedly involved and the statements themselves. More importantly, the state failed to prove the statements were spontaneously made).

211. See FLA. STAT. § 90.803(2) (1987). Most recent cases discussing excited utterances found error in the trial court's admission of hearsay statements under this exception. The most frequent source of error was the state's failure to lay a predicate that the statements were made immediately after an exciting event or while the declarant was still under some stress. See *Salter v. State*, 500 So. 2d 184, 186 (Fla. 1st Dist. Ct. App. 1986) (child sexual assault victim's statement made to a child protection team member several hours after the alleged incident should not have been admitted as an excited utterance since "the state failed to demonstrate that it was made when the child was still in an 'excited' state of mind and before she had an opportunity to reflect or deliberate." However the error was harmless); *Jano*, 510 So. 2d at 617 (child sexual battery victim's allegedly spontaneous statements about her father's abusive acts should not have been admitted under § 90.803(2) when the state did not show the time between the event and the statements. Without this evidence, there was no proof the statements were "made immediately following the event or while the declarant was in an excited state of mind caused by the incident"); *Blue v. State*, 513 So. 2d 754 (Fla. 4th Dist. Ct. App. 1987) (A witness's statements made one-half hour after he saw the defendant discard a vial of drugs during a police chase were not admissible under § 90.803(2) where the state merely cited the hearsay exception without laying any predicate for its existence in response to a defense hearsay objection.).

For the one recent case upholding admission of hearsay statements under the excited utterances exception see *Smelley v. State*, 500 So. 2d 318 (Fla. 1st Dist. Ct. App. 1986) (a robbery victim's statements describing the crime were properly admitted as excited utterances when they were made immediately after the event to the driver of a passing car into which the victim fled).

212. See FLA. STAT. § 90.803(3) (1987); *Danches v. Danches*, 503 So. 2d 461 (Fla. 3d Dist. Ct. App. 1987) (the court concluded without explanation that the trial court misapplied § 90.803(3) in excluding certain unspecified statements.); *Koon v. State*, 513 So. 2d 1253, 1255 (Fla. 1987) (the court merely notes "the state of mind

tion;²¹⁴ admissions by an employee or agent made during and concerning their work;²¹⁵ child sexual abuse victim statements;²¹⁶ former

exception to the hearsay rule . . . refers only to the declarant's state of mind" in finding that certain statements were admissible for their effect on the listener.).

For an excellent recent article discussing the state of mind exception's basics see McElhaney, *State of Mind*, 13 LITIGATION 57 (Fall 1986).

213. See FLA. STAT. § 90.803(6) (1987); *Saul v. John D. and Catherine T. MacArthur Foundation*, 499 So. 2d 917, 920 (Fla. 4th Dist. Ct. App. 1986) (the trial court's decision to exclude certain records was correct since the proponent failed to satisfy the four requirements for the business record exception).

See McElhaney, *Business Records*, 13 LITIGATION 49 (Summer 1987) for a brief discussion of this exception.

214. See FLA. STAT. § 90.803(8) (1987); *State v. Thompson*, 20 Fla. Supp. 2d 87 (Lee County 1986) (manufacturer's required documentation, filed with the Department of Health and Rehabilitative Services, that an alcohol breath testing instrument meets federal Department of Transportation standards is a public record).

215. See FLA. STAT. § 90.803(18)(d) (1987); *St. Paul Fire and Marine Insurance Company v. Welsh*, 501 So. 2d 54 (Fla. 4th Dist. Ct. App. 1987) (The trial court, in a bad faith action against the insurance company, properly admitted letters written to the company by its consulting attorney giving his opinion how the claim should be handled since the letters fell under § 90.803(18)(d)). Readers should note that in *St. Paul* the company waived any privilege objection, because it produced the letters before asserting they were protected.

The question whether an attorney's statements while working for a client can later be used against the client deserves close attention. *State v. Palmore*, 510 So. 2d 1152 (Fla. 3d Dist. Ct. App. 1987), although characterized as a case involving adoptive admissions, could arguably be an example of where an attorney's pleadings filed earlier in a case are later used against a client in the very same case. See text accompanying notes 253-58 *infra* for further discussion of *Palmore*.

For a good recent discussion of virtually all the evidentiary and constitutional issues concerning use of attorneys' statements made during their work for a client as admissions see Humble, *Evidentiary Admissions of Defense Counsel in Federal Criminal Cases*, 24 AMER. CRIM. L. REV. 93 (1986). The author examines FED. R. EVID. 801(d)(2)(D), similar to Florida's provision, and concludes that "[a]ttorneys admissions which meet the test of admissibility under Rule 801(d)(2) of the Federal Rules of Evidence should be admissible to the same extent as statements made by other agents." *Id.* at 123.

However, recently in *United States v. Valencia*, 826 F.2d 169 (2d Cir. 1987), the court refused to allow a defense counsel's representations to a prosecutor, allegedly based on what the client had told defense counsel, in the hope of having Valencia released on bail, to be later used at trial against the defendant. The second circuit noted that it had previously approved use of "statements made by an attorney concerning a matter within his employment . . . against the party retaining the attorney," in *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984), but declined to do so here. *Id.* at 174. In *McKeon*, the admission was the attorney's description of certain facts in the opening statement. Here the alleged admissions occurred during a non-public conversa-

testimony²¹⁷ and impeaching a hearsay declarant.²¹⁸

A. Hearsay Defined

1. Classic Hearsay Definition Cases

Last survey, the recent cases discussing what constitutes hearsay under the Florida Evidence Code outweighed in terms of their importance those cases discussing various hearsay exceptions. While the op-

tion. Thus in *Valencia*, there were two significant reasons to not hold the statements against the client. First, there was no clear proof as to what the exact contents of the statement was, as opposed to *McKeon* where the statement was on record. Second, the policy of encouraging plea negotiations would be thwarted by holding counsel's statements against the client in *Valencia*.

The author believes that *Valencia's* first reason alone is enough to justify the different results. Not only is there definite proof of the admissions when only public statements made in pleadings or orally in open court can constitute admissions but also here counsel should logically be on the most guard and notice that their statements could come back to later haunt their clients.

216. See § 90.803(23) (1987); *Salter v. State*, 500 So. 2d 184 (Fla. 1st Dist. Ct. App. 1986) (as § 90.803(23) contains specific provisions including pretrial notice to the accused of the state's intention to offer such statements and a pretrial hearing at which the trial court must make factual findings on the reliable of such statements, failure to comply with these requirements was error); *Perez v. State*, 500 So. 2d 725, 726 (Fla. 5th Dist. Ct. App. 1987) (the trial court finding that a three and one-half year old child would be exposed to "the substantial likelihood of severe mental harm . . . if it were required to testify in open trial proceedings" satisfied § 90.803(23)'s unavailability requirement even though the court did not personally examine the child before making its determination); *Glendening v. State*, 503 So. 2d 335 (Fla. 2d Dist. Ct. App. 1987) (the court found that § 90.803(23) does violate an accused's Right to Confrontation nor does its use in a case involving a crime allegedly committed before the exception's creation pose an *ex post facto* law problem since § 90.803(23) is procedural rather than substantive in nature).

217. See FLA.STAT. § 90.804(2)(a) (1987); *State v. Hill*, 504 So. 2d 407 (Fla. 2d Dist. Ct. App. 1987) (The former testimony of a state witness given in the defendant's previous trial can be used against the defendant in a later trial for the same charge when the state cannot produce the witness despite defense claims the witness was not believable. "In determining whether prior testimony should be admitted, the *credibility* of that testimony is not an issue." *Id.* at 411 (emphasis in original)).

218. See FLA. STAT. § 90.806 (1987); *State v. Hill*, 504 So. 2d 407 (Fla. 2d Dist. Ct. App. 1987) (An unavailable hearsay declarant may be impeached with a written inconsistent statement without following the usual requirement under § 90.614(1) of first confronting the witness with the statement. Also when a hearsay declarant is unavailable, extrinsic evidence of an inconsistent statement may be introduced without first giving the witness a chance to deny or to explain this statement).

posite situation prevailed during this survey, there were still several interesting cases discussing the definition of hearsay worth noting.

Florida Statute section 90.801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."²¹⁹ Thus for any item to be hearsay, there must be three components present: (1) a statement, (2) the statement's words must be offered as being true, and (3) the statement must have been originally made somewhere else besides the present trial or hearing.²²⁰ As in past years, Florida courts and lawyers had no difficulty deciding what constitutes a statement. However, the last two components continue to pose some problems.

a. The "truthfulness" component of hearsay

The second component requires that the statement be offered for the literal truth of its words to be hearsay. Deciding whether this component is present requires an analysis of *why* a statement is being offered. A statement may be hearsay or non-hearsay, depending on the offering party's purpose in using the statement. When a statement is truly being submitted for some purpose other than its literal truth, there is no hearsay problem. Two recent and interesting cases illustrate this simple proposition. *Warner v. Walker*²²¹ involved a continuing custody dispute between the parents of a five year old child. At trial, the judge allowed in over the mother's hearsay objections a video-taped interview between the child and a deputy sheriff containing the child's statements about his new stepfather's sexual misconduct in the child's

219. FLA. STAT. § 90.801(c)(1987). The words "or hearing" used in this definition should remind attorneys that hearsay issues can crop up at any kind of adjudicative proceeding and not just trials.

For a recent case illustrating this point, see *Camp v. State*, 501 So. 2d 81 (Fla. 1st Dist. Ct. App. 1987) where the district court reversed and remanded for resentencing after the trial court had relied exclusively on hearsay from a presentence investigation report's preparer to meet the defendant's claims that the report was inaccurate as to number of Camp's past convictions and as to whether he was on parole when the instant offenses were committed. "A valid hearsay objection cannot be overcome by . . . having the proponent of the hearsay (in this case, the PSI, scoresheet preparer) simply repeat his hearsay evidence and affirm that he believes it to be correct." *Id.* at 83).

220. For another discussion of these components see Dobson, *Hearsay Defined-A Brief Look at Florida Statute § 90.801*, 14 Avoc. 1 (Fla. Bar Trial Lawyers Section Oct. 1987).

221. 500 So. 2d 645 (Fla. 2d Dist. Ct. App. 1986).

presence and the father's testimony repeating the child's alleged statements concerning his stepfather's purported drug use. The child did not actually testify at the hearing since both parties agreed he was not a competent witness. On appeal, the district court agreed with the argument that all these statements could have been used for a legitimate non-hearsay purpose, say, to show the emotional and mental condition by his way of speaking and to show the child's knowledge of and feelings about drugs. However, since the trial court made several findings of fact which could only have been supported by using the statements for their truth, reversal was required. *Warner* illustrates that even when out of court statements are initially admitted for a proper non-hearsay purpose, their subsequent misuse by either the attorneys or the trial court for the truth of their contents is potential reversible error.

In *Koon v. State*,²²² the Florida Supreme Court presented a concise and thoughtful discussion of when an out of court statement is hearsay. Koon was charged with murdering one of two witness scheduled to testify against him in a federal counterfeiting case. At his first degree murder trial, the state presented the testimony of a secret service agent who had been present at Koon's federal preliminary hearing and who claimed to have heard the presiding magistrate tell Koon she would have dropped the counterfeiting charge if there had been only one witness. When Koon objected to this as hearsay, the trial court permitted the agent's testimony to show state of mind. On appeal, the Florida Supreme Court agreed with Koon and held that under the state of mind exception, Florida Statute section 90.803(3), the statement can only show the declarant's state of mind. Furthermore, the supreme court agreed that the declarant magistrate's state of mind was irrelevant to the murder charge. However the supreme court correctly recognized that a person's state of mind can be shown in at least two ways. Someone may make statements which directly reflect what they are thinking. If so, the statements fall under the state of mind exception. But someone's state of mind may also be influenced by what they are told. In the second way, the statement's relevancy does not depend on whether it is actually true but on whether the listener might believe it to be true and act accordingly.²²³ In *Koon*, the second way made the agent's testimony admissible. As the court stated, "the testimony was not offered to prove the truth of the magistrate's statement but rather

222. 513 So. 2d 1253 (Fla. 1987).

223. For an excellent brief discussion of the subject, see McElhaney, *State of Mind*, 13 LITIGATION 57 (Fall 1986).

to show that having heard the statement, Koon could have formed the motive for eliminating one of the two prosecuting witnesses.”²²⁴

b. The “out of court” component

The third and final hearsay definitional component requires that the allegedly truthful statement be “other than one made by the declarant while testifying at the trial or hearing.”²²⁵ Hearsay is considered suspect partly because the statement is originally made when the present trier of fact is not present and the statement usually is not immediately scrutinized. The third hearsay component depends on *when* the statement was originally made and not *who* made it. Unfortunately trial counsel and courts sometimes forget this basic proposition, as a recent case shows.

*Blue v. State*²²⁶ involved an appeal from a possession of cocaine conviction. At trial a police officer testified he chased Blue after the officer saw something had passed between Blue and another man. During the chase Blue supposedly disposed of a capsule before the officer could see what it contained. Half an hour later when the officer found the vial, he arrested Blue in an elderly by-stander’s presence. Over defense hearsay objections, the trial court allowed the officer to testify that the by-stander had identified Blue as the person who had thrown away the capsule. On appeal the state first unsuccessfully argued the by-stander’s statement fell within the spontaneous statement hearsay exception²²⁷ and then argued the statement was non-hearsay because the by-stander testified for Blue at trial. However, the district court correctly rejected this argument stating “[t]he fact that the witness tes-

224. *Koon*, 513 So. 2d at 1253. Recent cases show that there is one caveat to the notion that out of court statements, not being offered for the truth, but offered for another relevant purpose should be admissible as non-hearsay.

Hearsay can be legitimately used as a basis for establishing probable cause in a criminal case, see *Draper v. United States*, 358 U.S. 307, 311-12 (1959). However, Florida case law only allows a police officer to testify about taking certain action pursuant to an informant’s information, while disallowing a police officer to reveal the actual contents of conversations with an informant to explain why the officer took certain actions. See *Collins v. State*, 65 So. 2d 61 (Fla. 1953). For two recent cases finding the admission of such statements reversible error see *Haynes v. State*, 502 So. 2d 507 (Fla. 1st Dist. Ct. App. 1987); *Garcia-Perez v. State*, 510 So. 2d 1051 (Fla. 3d Dist. Ct. App. 1987).

225. FLA. STAT. § 90.801(c)(1987).

226. 513 So. 2d 754 (Fla. 4th Dist. Ct. App. 1987).

227. See *supra* note 211.

tified during appellant's case did not affect the inadmissibility of the clear hearsay statements made by the officer."²²⁸ *Blue* stands for an elementary proposition trial courts and lawyers need to constantly remind themselves of — just because the person who made the out of court statement is present at trial or a hearing and can testify — out of court statements being offered for their truth are *still* hearsay!²²⁹

2. Statutory Non-Hearsay: Prior Statements

Florida Statutes section 90.801(2) enumerates three situations where statements falling within the classical hearsay definition are declared to be non-hearsay. Under Section 90.801(2) out of court statements will be non-hearsay if two common elements are present. The hearsay declarant must "testif[y] at the trial or hearing"²³⁰ and also be "subject to cross-examination concerning the statement"²³¹ at trial or hearing. When these two elements are present, certain prior inconsistent statements made under oath, certain prior consistent statements and prior statements of identification are made non-hearsay.²³²

a. Prior Inconsistent Statements Under Oath

Of the three types of statements Section 90.801(2) recognizes as non-hearsay, only prior inconsistent statements made under oath have received major treatment in the case law during the past few years. Indeed, last year's survey noted major decisions in two distinct areas involving prior inconsistent statements under oath. First, the Florida Supreme Court declared prior inconsistent statements under oath by

228. *Blue*, 513 So. 2d at 756. The district court's statement is actually wrong in one regard. The hearsay statements were those of the by-stander not the officer. The officer merely repeated them in court.

229. For another recent case on this point see *Logan v. State*, 511 So. 2d 442, 443 (Fla. 5th Dist. Ct. App. 1987) (A defendant may not offer for the truth his own self-serving statements made several hours after his arrest unless they fall within some exception).

Two other recent cases dealt with what constitutes inadmissible hearsay during this survey period. However the opinions provide only summary statements of little value. See *Williams v. State*, 502 So. 2d 68 (Fla. 3d Dist. Ct. App. 1987) and *Williams v. State*, 510 So. 2d 656 (Fla. 2d Dist. Ct. App. 1987).

230. FLA. STAT. § 90.801(2) (1987).

231. *Id.*

232. See *supra* note 209. For a brief discussion of a recent United States Supreme Court decision involving Federal Rule 801(d)(1)(C), see *supra* note 36.

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themselves insufficient evidence upon which to base a criminal conviction.²³³ Additionally, the Florida Supreme Court attempted to establish a partial "bright line" test by declaring that prior sworn statements made during police investigation do not qualify as "other proceeding[s]" under Section 90.801(2)(a).²³⁴ Both topics received mention in the case law during the present survey with most of the attention focused on what constitutes an "other proceeding".²³⁵

In *Delgado-Santos v. State*²³⁶ the court decided that for purposes of Section 90.801(2)(a), the word "proceeding" taken alone "implies-employing various permutations of the expression- a degree of formality, convention, structure, regularity and replicability of the process in question."²³⁷ Situations where a person is formally questioned under oath, in a setting analogous to a trial, such as grand jury testimony, had these safeguards, while informal police interrogation, even when the person is placed under oath, do not. Despite *Delgado-Santos's* apparently clear "bright line" test, the First District Court of Appeal declined to follow it in *Kirkland v. State*.²³⁸ Kirkland had been convicted of beating his girlfriend after breaking into her apartment. Due to the victim's condition, police officers waited until the day after the incident to take a statement from her. At the hospital, the victim signed a typed statement on a complaint form after she was put under oath. At trial the victim denied remembering the facts in the complaint, and the state introduced the complaint as a prior inconsistent statement under oath. The First District Court on rehearing, even after the supreme court's decision in *Delgado-Santos*, still found the statement admissible under Section 90.801(2)(a). The district court refused to believe "that the Supreme Court intended that its holding disqualify the kind of statement given in the instant case, i.e., a sworn statement given by an as-

233. See *State v. Moore*, 485 So. 2d 1279 (Fla. 1986).

234. See *Delgado-Santos v. State*, 497 So. 2d 1199 (Fla. 1986).

235. For the only recent case mentioning that a prior inconsistent statement under oath standing alone is insufficient evidence for a criminal conviction see *Chambers v. State*, 504 So. 2d 476 (Fla. 1st Dist. Ct. App. 1987) (a child victim's prior inconsistent statements in a sexual battery could be used as substantive evidence to convict since they were corroborated by testimony of three other witnesses).

236. 497 So. 2d 119 (Fla. 1986).

237. This quotation is actually from the Third District Court's opinion which the Florida Supreme Court adopted as its reasoning in the case. *Delgado-Santos v. State*, 471 So. 2d 74, 75 (Fla. 3d Dist. Ct. App. 1985).

238. 495 So. 2d 831 (Fla. 1st Dist Ct. App. 1986) *aff'd on rehearing*, 497 So. 2d 741 (Fla. 1st Dist. Ct. App. 1986).

sault victim in her hospital room to a police officer/notary public for the purpose of securing a warrant and instituting prosecution. . . .²³⁹ If allowed to stand, the First District's opinion would undermine the utility of the *Delgado-Santos's* "bright line" test. Fortunately, this did not happen. During the present survey, the Florida Supreme Court reversed the First District's decision.²⁴⁰ While the supreme court found the victim's statement in *Kirkland* potentially more reliable than the one in *Delgado-Santos*, the court decided this was an insignificant distinction. Indeed the supreme court's brief decision "reiterat[ing] that a police investigation is not an 'other proceeding' as contemplated by section 90.801(2)(a)"²⁴¹ finally settles this question.²⁴²

One final case provides additional guidance as to what constitutes an "other proceeding" under Section 90.801(2)(a). In *Jennings v. State*,²⁴³ the court considered an appeal from a conviction on various murder, kidnapping, and sexual battery charges. At trial, Jennings's former cellmate gave damaging testimony against him, claiming that Jennings had confessed the victim's rape and murder to him. The defense tried to attack this witness's credibility by questioning him about sworn pre-trial motions from the informer's case alleging his insanity. The witness admitted making the motions but claimed he lied in them. The trial court prohibited defense counsel from introducing the motions themselves. The Florida Supreme Court in a short opinion affirmed both Jennings's conviction and the trial court exclusion of the motions. The supreme court found that since the witness admitted making the statements, they could not be introduced for impeachment. More importantly, the supreme court concluded the statements had not been made under oath in a "trial, hearing, or other proceeding or in a deposition" as Section 90.801(2)(a) requires. Unfortunately the supreme court does not explain its decision on this last point. However the result is completely consistent with the *Delgado-Santos* definition of "proceeding".²⁴⁴

Recent cases discussing "other proceeding" for purposes of Section 90.801(2)(a) clearly indicate the Florida Supreme Court prefers a con-

239. 497 So. 2d at 742.

240. See *Kirkland v. State*, 509 So. 2d 1105 (Fla. 1987).

241. *Id.*

242. For another recent case finding that statements to a police investigator are not admissible under § 90.801(2)(a) see *Cooper v. State*, 506 So. 2d 1157 (Fla. 3d Dist. Ct. App. 1987).

243. 512 So. 2d 169 (Fla. 1987).

244. See *supra* note 237.

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servative approach. Thus mere sworn statements under oath without any type of regularized or quasi-formal testimonial setting will not qualify. As a practical matter, the supreme court has substantially reduced the variety of potential statements which can qualify for admission under Section 90.801(2)(a) by favoring a "bright line" approach to this question.

B. Hearsay Exceptions

1. Admissions

Florida Statute section 90.803(18) recognizes five different kinds of statements that when offered by one party against the opposing side are classified as admissions. Probably the strongest support for the admissions exceptions comes from a general notion of holding a party responsible for statements they or someone else make on their behalf. As a general principle, any statement made or assented to by the opposing party or by someone working for or in concert with the opposing party should come within one of the five admissions exceptions. Given the simplicity of Section 90.803(18), it is not surprising that this section has not generated a lot of significant or controversial caselaw. Thus some of the recent Florida case law on admissions is startling for the questionable and, in one case, totally wrong decisions that have been rendered.

a. Personal Admissions

Florida Statute section 90.803(18)(a), makes any party's "own statement in either an individual or a representative capacity"²⁴⁵ admissible as a hearsay exception when the statement is offered against that party. This exception, commonly called personal admissions, should be the easiest of all hearsay exceptions and certainly is most supported by the concept of responsibility. Indeed, if people are not willing to later on assume responsibility for their statements, they probably should not have been made to begin with.

The appropriate inquiry needed to decide if a personal admission exists is virtually mechanistic in nature. Assuming a statement has been made, courts need only decide whether (1) a party made it and (2) the statement is now being offered by someone opposing the making

245. FLA. STAT. § 90.803(18)(a) (1987).

party in the litigation. If both questions are answered affirmatively, the statement may still be excluded but *not* for hearsay reasons.

Despite the simplicity of the personal admission exception, the Third District Court of Appeal managed to completely misapply section 90.803(18)(a) in a recent opinion which will hopefully not be relied upon for its hearsay analysis. *Hernandez v. Charles E. Virgin, M.D., P.A.*²⁴⁶, involved a medical malpractice action against two doctors and the professional association which employed them. At trial, the plaintiffs tried unsuccessfully to introduce a memorandum²⁴⁷, describing certain occurrences during the patient's operation, which one defendant doctor had written to the other defendant doctor. After a defense verdict, the plaintiffs appealed, raising multiple issues including the trial's court exclusion of the memorandum.²⁴⁸

However, the third district refused to find error in the memorandum's exclusion. The court somehow found, in a brief one paragraph statement, that the document was only admissible for impeachment should the defendants make some statement at trial inconsistent with its contents. As to the document's admissibility on its own for substantive purposes, the court found its exclusion proper since it "was not admissible as an admission against self-interest".²⁴⁹

Finding an opinion which misinterprets section 90.803(18) more than *Hernandez* would probably be an impossible task. The memorandum clearly was a personal admission, since one of the named defendants authored it and the plaintiffs were now offering it against this doctor! Admittedly, the memorandum could only constitute a personal admission as to the author and not as to the other doctor or the professional association. Unless some other exception existed which would make the memorandum also admissible against the other two defendants,²⁵⁰ the correct ruling would have been to admit the document only

246. 505 So. 2d 1369 (Fla. 3d Dist. Ct. App. 1987).

247. The Third District's opinion did not clarify which side sought to introduce the memorandum. This information was provided by plaintiff's counsel.

Telephone interview with Steven M. Weinger, Miami, counsel for appellants (Feb. 19, 1988).

248. The appellate court actually reversed and remanded for a new trial, because of *ex parte* communications between a deliberating juror and the judge. The appellate court's decision also noted several other non-evidentiary errors committed by the trial court.

249. 505 So. 2d at 1370.

250. For example, if the author was working for the professional association when he wrote the memorandum and the memorandum was written pursuant to his

against its author and give the jury appropriate limiting instructions concerning the other two defendants. However, neither the trial nor appellate court recognized this point. Instead, the Third District based its affirmance of the memo's exclusion on totally non-existence grounds! While there may have been some jurisdictions, perhaps even Florida, that at one time excluded a party's statements unless they were "against interest", *there is no such thing as an admission against interest under the present of the Florida Evidence Code!*²⁵¹ Thus the reasoning for excluding the memorandum was based on an evidentiary concept that does not exist. At best, the Third District's reference to admissions against interest might be excused as an inadvertent slip. At worst, this reference represents careless and totally incorrect terminology. Either way the *Hernandez* hearsay opinion is not worthy of being followed.²⁵²

b. Adoptive admissions

Like the personal admission exception, the exception for adoptive admissions easily fits within the notion of assuming responsibility for one's own statements. Admittedly with an adoptive admission, the party whom the statement is now being used against did not actually make the statement. However, if the party has somehow clearly expressed agreement with the statement, the party should be just as willing to assume responsibility for its contents or else should not have expressed agreement with the statement to begin with.

Adoptive admissions are commonly thought of as occurring in situations where one person immediately expresses verbal agreement with something said by another. However, as *State v. Palmore*²⁵³ recently demonstrated, adoptive admissions can exist whenever agreement with another's statement is somehow expressed, no matter what the form of

employment, it could have qualified as an employee admission, FLA. STAT. § 90.803(18)(d) (1987).

251. Ironically the Third District has recently recognized that for the adoptive admissions exception, the adopted statement does not have to be against the adopting party's interest at the time of the adoption. See *State v. Palmore*, 510 So. 2d 1152, 1153 (Fla. 3d Dist. Ct. App. 1987).

252. Although no other case during the survey period discusses personal admissions, *State v. Palmore*, 510 So. 2d 1152 (Fla. 3d Dist. Ct. App. 1987) arguably involved them since the defendant's own statements in a sworn affidavit supporting a motion to dismiss were later admitted against him at trial.

253. 510 So. 2d at 1152.

expression. Florida Rule of Criminal Procedure 3.190(c)(4) provides for dismissal of a criminal charge when "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant."²⁵⁴ This motion is analagous to a summary judgment in a civil case. However, just filing a motion for dismissal alleging that there are no uncontested material facts is not sufficient. Rather, the rule specifically requires that "[t]he facts on which such motion is based should be specifically alleged and the motion sworn to."²⁵⁵ *Palmore* filed a motion to dismiss which accepted as true for purposes of the motion many of the facts which the victim had alleged in the complaint. To comply with the rule, *Palmore* also filed a sworn affidavit asserting the truth of the facts alleged in his motion. After *Palmore* withdrew this motion, the state moved pre-trial for a ruling declaring it an adoptive admission. After the trial court rejected this argument, the state appealed. The third district, in a short but important opinion, reversed, concluding that "*Palmore* expressly manifested his belief in the truth of the statements contained in the motion to dismiss, thereby adopting those statements as his own."²⁵⁶ The district court rejected two arguments that finding these statements were adoptive admissions would infringe on a defendant's right to utilize Rule 3.190(c)(4)'s dismissal procedure. The court found that although the criminal procedure rules provided such a procedure, a motion to dismissal did not have the same constitutional status as other types of criminal pre-trial motions. Additionally, the third district found that *Palmore* could have avoided making an adoptive admission and still filed for dismissal by not expressly agreeing with the victim's facts but rather by alleging that "even if the facts were true, they were not material, and that based upon the admitted undisputed material facts, the state failed to establish a prima facie case."²⁵⁷ Assuming the court's opinion on how *Palmore* could have filed his motion and still avoided an adoption is correct, *Palmore* merely presents a situation where careful drafting can avoid creating harmful adoptive admissions. At any rate, *Palmore* should serve as a reminder that any statement in a pre-trial pleading is subject to later potential use against the side filing the

254. FLA. R. CRIM. P. 3.190(c)(4) (1987).

255. *Id.* For further discussion of motions to dismiss pursuant to this rule see Miller, *Rule 3.190(c)(4) Motions — A Fall From Grace*, 13 FLA. ST. U.L.REV. 257 (1985).

256. *Palmore*, 510 So. 2d at 1153.

257. *Id.* at 1154, n.3.

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pleading as some sort of admission.²⁵⁸

c. Coconspirator Statements

The fifth and final type of admission exception the Florida Code recognizes is for coconspirator statements. Florida Statute section 90.803(18)(e) defines these as "[a] statement made by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy."²⁵⁹ During the present survey period, Florida courts decided only a few, rather insignificant cases dealing with this exception.²⁶⁰ However, the United States Supreme Court last term decided a major case construing the federal coconspirator statement rule.

It offered against a party, Federal Rule of Evidence classifies as non-hearsay "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."²⁶¹ *Bourjailly v. United States*²⁶² addressed three separate questions regarding this rule: "(1) whether the court must determine by independent evidence that the conspiracy existed and that the defendant and the declarant were members. . . (2) the quantum of proof on which such determination must be based; and (3) whether a court must in each case examine the circumstances of such a statement to determine its reliability."²⁶³

As to the first issue, the Court recognized that whether a conspiracy existed and whether the defendant and declarant were members was a necessary pre-condition to admission of any alleged coconspirator statements. This issue therefore constituted a preliminary question which had to be answered affirmatively before a statement could be admitted under Rule 801(d)(2)(E). Examining Rule 104(a), *Questions of admissibility generally*, the Court found that under its express lan-

258. As indicted elsewhere in this article, parts of *Palmore's* motion might also have qualified as either personal, authorized or employee admissions. See *supra* notes 215 and 252.

259. FLA. STAT. § 90.803(18)(e) (1987).

260. See *Moore v. State*, 503 So. 2d 923 (Fla. 5th Dist. Ct. App. 1987) (reversing a defendant's conviction because the state failed to establish an independent basis showing that the defendant was a member of the conspirator when the alleged coconspirator statements were made); *Huhn v. State*, 511 So. 2d 583, 590 (Fla. 4th Dist. Ct. App. 1987) (merely noting in discussing another issue that coconspirator statements are "admissible only when there is independent evidence that both the declarant and the objecting party were members of the conspiracy").

261. FED. R. EVID. 801(d)(2)(E).

262. 107 S. Ct. 2775 (1987).

263. *Id.* at 2777-78.

guage, a court in making a preliminary determination "is not bound by the rules of evidence except those with respect to privileges."²⁶⁴ The Court therefore rejected the defendant's argument that the existence of a conspiracy and the defendant's participation could only be established by evidence totally independent of the alleged coconspirator statements themselves. Instead the Court concluded that the alleged coconspirator statements themselves could be considered along with any other available evidence in making the preliminary determination Rule 801(d)(2)(E) requires.

As to the two remaining questions, *Bourjailly* decided that since Rule 104 specified no quantum of proof for making the required preliminary determination, the preponderance of the evidence standard used in other preliminary determinations would suffice. Finally, the Court decided that the trustworthiness of coconspirator statements as hearsay exceptions for Confrontation Clause purposes did not have to be evaluated on a case by case basis. Rather the Court concluded that coconspirator statements satisfying Rule 801(d)(2)(E) should be considered firmly rooted exceptions not needing any additional indicia of trustworthiness for admission.

Bourjailly will certainly have a dramatic effect on federal evidence law. Despite Florida courts recognition that both the Florida and federal versions of the coconspirator statement rule are almost identically phrased,²⁶⁵ *Bourjailly's* effect on Florida evidence law is not likely to be as great. Even before *Bourjailly*, Florida courts recognized that whether a conspiracy existed and who belonged to it when the alleged conspirator statements were made is a preliminary question for the trial courts.²⁶⁶ Likewise, some Florida courts²⁶⁷ and commentators²⁶⁸ assert this question should be decided by a preponderance of the evidence standard.²⁶⁹ Admittedly, the Florida Supreme Court has not defined

264. FED. R. EVID. 104(a).

265. See *Boyd v. State*, 389 So. 2d 642, 646 (Fla. 2d Dist. Ct. App. 1980).

266. See *Tumulty v. State*, 489 So. 2d 150, 152 (Fla. 4th Dist. Ct. App. 1987) ("[R]esolution of these evidentiary questions is for the court in its sound discretion and will not be disturbed absent an abuse thereof").

267. See *Saavedra v. State*, 421 So. 2d 725, 727 (Fla. 4th Dist Ct. App. 1982). ("[T]he trial judge must decide whether the independent evidence introduced 'has demonstrated the defendant's participation in a conspiracy by a preponderance of the evidence'" quoting *United States v. Grassi*, 616 F.2d 1295, 1300 (5th Cir. 1980) cert. denied 449 U.S. 956 (1980)).

268. See C. EHRHARDT, *FLORIDA EVIDENCE* § 803.18f (2d ed. 1984).

269. For cases asserting that such a preliminary question should be based on a

the appropriate quantum of proof for this area.²⁷⁰ However, since Florida Statute section 90.105(1) on preliminary questions is similar to Federal Rule 104(a) and since Florida case law on the coconspirator exception has relied heavily on federal cases interpreting Rule 801(d)(2)(E), adopting *Bourjailly's* preponderance of the evidence standard as the required quantum of proof seems appropriate.

However, Florida courts should *not* adopt *Bourjailly's* finding that the alleged coconspirator statements themselves can be considered in deciding the necessary preliminary question of whether a conspiracy existed and whether the defendant and declarant were members.²⁷¹ Un-

finding supported by "substantial evidence", see *Wilson v. State*, 466 So. 2d 1152, 1155 (Fla. 2d Dist. Ct. App. 1985) (The court defined "substantial evidence as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred . . . [or] such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." quoting *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

270. See *Briklod v. State*, 365 So. 2d 1023, 1026 n.5 (Fla. 1979) (the court noted that various quantum of proof have been established for this question but declined to specifically establish one of them).

271. *Bourjailly's* third finding that coconspirator statements should be considered firmly rooted exceptions to the hearsay rule for federal Confrontation Clause purposes is, of course, binding on Florida courts.

Ohio v. Roberts, 448 U.S. 56 (1980), had previously seemed to establish two strict pre-requisites for admission of any hearsay statement over a Confrontation Clause objection. The first pre-requisite noted the Confrontation Clause's historical preference for face-to-face confrontation of the witnesses before the fact finder whenever possible. This pre-requisite supposedly established a strict rule of necessity regulating the use of hearsay in criminal cases. Thus under this pre-requisite, "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65. Assuming a hearsay declarant was unavailable for Confrontation Clause purposes, the second pre-requisite was concerned with regulating the admission of only reliable hearsay. *Roberts* found that this reliability could come from two sources: one, reliability would be presumed whenever the statement "falls within a firmly rooted hearsay exception," *Id.* at 66, or two, there could be on a case by case basis "a showing of [the statement involved] particularized guarantees of trustworthiness." *Id.* at 66.

During the 1985 term, the Supreme Court in *United States v. Inadi*, 106 S. Ct. 1121 (1986), retreated from *Roberts's* claim that a strict showing of a hearsay declarant's unavailability was always necessary to satisfy the Confrontation Clause. Instead the Court claimed that this part of the *Roberts* opinion was confined to the type of hearsay statements involved in it, former testimony. With respect to other types of hearsay statements, *Inadi* found that declarant unavailability was not always required since at least with coconspirator statements "[b]ecause they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court." *Id.* at

like Federal Rule 801(d)(2)(E), Florida Statute section 90.803(18)(e) contains a second sentence which explicitly states that "[u]pon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence . . .".²⁷² Thus the Florida hearsay rule seems to explicitly require that the preliminary findings necessary for a coconspirator statements' admission be based on evidence outside of the alleged statements themselves. Furthermore, the Florida courts have consistently interpreted the evidence code this way. Independent proof of a conspiracy's existence and the defendant's and hearsay declarant's participation in the conspiracy has been called "the threshold condition of admissibility of a co-conspirator's hearsay statement".²⁷³ Indeed, the Florida Supreme Court recently declared that "to introduce hearsay statements into evidence under the admission of a coconspirator exception, there must be substantial independent evidence of the conspiracy and the [defendant's] participation in it."²⁷⁴ Thus despite *Bourjailly's* holding on the independent evidence issue, Florida courts must continue to require proof outside of the alleged coconspirator statements

1126 Thus the Court concluded that the situational context in which coconspirator statements are originally made is likely to be so much more reliable than the subsequent trial that there would be little utility in routinely forcing prosecutors to always produce coconspirators for testimony at trial. Therefore a strict showing of unavailability would not be required.

Inadi disposed of problems concerning *Roberts's* first pre-requisite whenever coconspirator statements are offered at trial. *Bourjailly's* conclusion that all coconspirator meeting Rule 801(d)(2)(E)'s requirements should be considered firmly rooted hearsay, and thus reliable, for Confrontation Clause purposes, disposes with any problems concerning *Robert's* second pre-requisite. As a practical matter, after *Inadi* and *Bourjailly*, any coconspirator statements meeting the federal coconspirator rule or its Florida counterpart will now automatically pose no Confrontation Clause problem.

For a short pre-*Inadi* article discussing *Roberts* and its possible implications see Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. Fla. L. Rev. 207 (1984). For a post-*Inadi* discussion of hearsay and confrontation issues generally see Comment, *The Confrontation Clause and the Hearsay Rule: A Problematic Relationship in Need of a Practical Analysis*, 14 Fla. St. U. L. Rev. 948, 973 (1987) (The writer concludes that as a practical matter "*Inadi* stops just short of declaring that in most contexts once evidence satisfies the hearsay exception requirements, no confrontation issue exists.").

For a discussion concerning Confrontation Clause problems posed by the hearsay exception for declarations against interest see *infra* notes 284-300.

272. FLA. STAT. § 90.803(18)(e) (1985) (emphasis added).

273. *Tresvant v. State*, 396 So. 2d 733, 737 (Fla. 3d Dist Ct. App. 1981).

274. *Nelson v. State*, 490 So. 2d 32, 35 (Fla. 1986).

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themselves until legislative action abolishes the second sentence in section 90.803(18)(e).

3. *Situational Hearsay Exceptions*

a. *Statements for Purposes of Medical Treatment*

The remaining traditional hearsay exceptions largely depend for their reliability on either the situation in which they are made, the contents of the statements or both. Usually these exceptions present few cases worth discussing. However, during the present survey period there were several cases, involving two situational hearsay exceptions, which merit serious attention.

Florida Statute section 90.803(4) establishes a hearsay exception for statements made for purposes of medical treatment or diagnosis. These statements are deemed reliable for two reasons. First, the law of evidence presumes that persons truly seeking medical aid will make as truthful and accurate statements about their condition as possible so they can get the best possible medical attention. Second, even when a declarant might be exaggerating or fabricating a medical condition, since the declarant's statement can often be checked by someone with medical expertise, this supposedly gives an extra bit of reliability to the situation in which the statement is made.

Florida Statute section 90.803(4), while similar to Federal Rule of Evidence 803(4), on its face takes a more restrictive view towards admission of these types of statements.²⁷⁵ Under neither version is the

275. FLA. STAT. § 90.803(4) states:

Statements made for purposes of medical diagnosis or treatment [by a person seeking the diagnosis or treatment or by an individual who who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which] statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

Federal Rule 803(4) is identical to this rule, except that it does not contain the bracketed language. Thus under Federal Rule 803(4), a person seeking medical treatment could make a statement to *anyone* who could then repeat the statement to a third party for the purpose of getting medical aid for the original declarant. Both statements under the federal rule would arguably qualify as exceptions, even though the repeating declarant had no responsibility for the person seeking treatment and even though the repeating declarant did not have personal knowledge of the facts upon which the requested medical aid was sought. Under a strict reading of § 90.803(4)'s language, the

person to whom the statement is made a critical factor for admission purposes. There is no hearsay exception for statements made to medical doctors.¹²⁷⁶ Thus the purpose behind the statement, not the recipient's identity, is the controlling factor in deciding whether Section 90.803(4) applies.

Since many people are not precise in their statements, a critical question can arise as to which part or parts of a statement made to a doctor should be admissible pursuant to section 90.803(4). *Saul v. John D. and Catherine T. MacArthur Foundation*²⁷⁷ recently provided excellent guidance in this area. The plaintiff had received injuries to her shoulder from a fall at the defendant foundation's spa. Both sides disputed how the fall occurred. Saul claimed she fell while leaving an elevator due to the operator's failure to stop the elevator even with the floor. The foundation claimed she injured herself by tripping on a carpet. After the fall, one orthopedic surgeon operated on the shoulder and then referred the plaintiff to a second orthopedic for further diagnosis and treatment. At trial, the defendant successfully admitted the second doctor's notes containing the statement, "This is a 78 year old year woman who fell yesterday by virtue of catching the heel of her shoe in the carpet."²⁷⁸ After a defense verdict, Saul appealed.

The Fourth District Court of Appeal reversed and remanded for a new trial in a short but excellently written opinion. The court noted that these statements were found in the patient's history section and would ordinarily be inadmissible hearsay. However if the statements "are relevant and necessary in consideration of the diagnosis and treatment of the patient"²⁷⁹ Section 90.803(4) would allow their admission over a hearsay objection. To decide whether this was so, the fourth district utilized a test adopted from case law construing Federal Rule 803(4). According to the court, "[t]he test when examining whether statements contained in medical records relating to the cause of an in-

same statement of the repeating declarant would not be an exception.

276. This notion cuts both ways. While not all statements made to medical doctors automatically qualify as being "for purposes of medical diagnosis or treatment", FLA. STAT. § 90.803(4), just because a statement has not been made to a doctor is not enough to keep it out. Indeed, the *Sponsors' Note* to § 90.803(4) specifically recognizes that "[u]nder this section, statements need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included."

277. 499 So. 2d 917 (Fla. 4th Dist. Ct. App. 1986).

278. *Id.* at 918.

279. *Id.* at 919.

jury are admissible hearsay, is whether such statements are of the type reasonably pertinent to a physician in providing treatment."²⁸⁰ Utilizing this test, *Saul* declared the statements should have been excluded. The district court found that usually a physician's own judgment as to whether the statements were reasonably related to treatment would be followed. Here the doctor had not expressed his opinion either way on this issue. In the absence of this information, *Saul* apparently utilized an objective test to conclude the statements should have been excluded. Since there was no doubt the plaintiff had a badly injured shoulder when she went to the two doctors, there was no question what her ailment was nor about when it began. Under these circumstances, the fourth district found the statement attributing the injury to a trip on a carpet totally unrelated to the doctor's treatment or diagnosis.

Saul also found the statement in the history should have been excluded for another reason. The doctor failed to identify the source of his information. This is important since section 90.803(4) limits statements for medical treatment to those made by the party seeking help or someone legally responsible for that party.²⁸¹ Without knowing where the statement originated from, there was no way of telling if the declarant had the personal knowledge section 90.803(4) requires.

Saul mandates a reasonable test for proponents of hearsay statements allegedly made for purposes of medical treatment and diagnosis to meet. The proponent of such statements must show why the statements should be considered relevant to treatment, if not the statement is inadmissible. *Saul* indicates that usually the treating or diagnosing doctor's affirmation as to such will suffice. If this is not done, then an objective comparison between the information in the statement and the reason why the patient went to the doctor in the first place must be done. *Saul* also indicates that courts need to know who is the statement's declarant. As a practical matter, this means that lawyers should be sure during discovery to establish the ultimate source of any information found in a medical history section concerning a patient. In the final analysis the *Saul* opinion establishes a sound but practical approach to admission of statements allegedly made for medical treatment. Hopefully all Florida courts will follow the Fourth District's guidance in this area.²⁸²

280. *Id.* quoting *Cook v. Hoppin*, 783 F.2d 684, 690 (7th Cir. 1986).

281. See *supra* note 275 above for discussion of this requirement.

282. For other recent cases involving § 90.803(4) see *Hungerford v. Mathews*, 511 So. 2d 1127 (Fla. 4th Dist. Ct. App. 1987) (distinguishing its opinion in *Saul*, the

b. Declarations Against Penal Interest

The second type of situational hearsay exception producing a case meriting discussion involves statements against penal interest. Modern evidence theory considers such statements reliable based on the assumption that people ordinarily do not purposely and carelessly make statements that would subject them to possible criminal liability unless the statements describe true events. Florida Statute section 90.804(2)(c) provides that when a declarant is unavailable, the declarant's statement "tending to expose the declarant to criminal liability"²⁸³ may qualify as a hearsay exception.

Cases discussing the declaration against penal interest seem to frequently generate Right to Confrontation questions. As noted earlier²⁸⁴, the United States Supreme Court is still in the process of clarifying the relationship between the Sixth Amendment's Confrontation Clause and the hearsay rule. Absent a face to face confrontation with a hearsay declarant at trial, hearsay can be admitted only when two requirements have been met. The declarant must be unavailable²⁸⁵ and the statement

court found that here statements attributing plaintiff's knee injury to having *twisted* it in a car accident as opposed to having *bumped* it in an earlier boating accident were relevant to medical treatment or diagnosis).

In *Hanson v. State*, 508 So. 2d 780 (Fla. 4th Dist. Ct. App. 1987) the court declared in an extremely short opinion that while a child sex abuse victim's statements to a doctor that someone had sex with her would fall within § 90.803(4), the additional statement naming who the person was would not. Recent cases from other jurisdictions show there is no consensus on this issue. For several cases differing from *Hanson*, see *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801 (1987); *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985); *State v. Maldonado*, 537 A.2d 600 (Conn. App. 1988). However, at least one other court has agreed with *Hanson's* result. See *Cassidy v. State*, 536 A.2d 666 (Md. Ct. Spec. App. 1988).

283. FLA. STAT. § 90.804(2)(c) (1987). However, if the declaration against penal interest is being offered by, instead of against, an accused, § 90.804(2)(c) contains the additional requirement that "corroborating circumstances show the trustworthiness of the statement." This provision aims to ensure that accomplices do not attempt to give out of court statements trying to mutually exculpate one another from criminal liability.

284. See *supra* note 271.

285. Unavailability for Confrontation Clause purposes means more than just not being present and able to testify at trial. When the state seeks to offer certain hearsay statements, it must make at least a "good faith effort to obtain his presence at trial." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) quoting *Barber v. Page*, 390 U.S. 719, 725 (1968).

As noted, *supra* note 271, the United States Supreme Court has not taken the position that declarant unavailability is an absolute pre-requisite for admission of all

must have adequate indicia of reliability for the fact finder to rely on it.

Confrontation Clause issues relating to the hearsay rule seem to frequently arise when more than one person is accused of perpetrating a particular crime. In the classic scenario, both co-defendants are tried together and the hearsay statement of one inculcating both is offered at the joint trial. If the hearsay declarant does not subsequently testify, the other co-defendant has no way of confronting him at trial through cross-examination. This exact situation produced a reversal in *Bruton v. United States*²⁸⁶ where in a joint trial, the statement of Bruton's non-testifying co-defendant inculcating them both had been introduced. Even though a clear jury instruction explaining that the co-defendant's statement should not be used against Bruton had been given, the Court still found there was a "substantial risk"²⁸⁷ the jury would have used it to convict. Virtually the same situation occurs when two co-defendants are jointly charged with the same crime but tried separately and the state tries to use against the accused the inculpatory statement of a co-defendant who refuses to testify based upon his fifth amendment Privilege against Self-Incrimination. Last year's survey noted that in *Nelson v. State*²⁸⁸ the Florida Supreme Court reversed a murder conviction because hearsay statements of a non-testifying accomplice to the murder had been admitted against Nelson as declarations against penal interest.²⁸⁹ The Florida Supreme Court based its reversal on two grounds. First, language in Section 90.804(2)(c)'s final sentence declaring that "[a] statement . . . which is offered against the accused in a criminal action, and which is made by a co-defendant or other person implicat-

hearsay statements. The Court has not taken any position on whether declarant unavailability is a constitutional pre-requisite for admission of any declaration against interest. However, Fla. Stat. §90.804(a) makes unavailability a statutory pre-requisite for admission of any declaration against interest and other miscellaneous hearsay exceptions. For a recent case reversing a criminal conviction because the state failed to establish declarant unavailability under §90.804(2)(a) before offering an alleged declaration against penal interest, see *Rivera v. State*, 510 So.2d 340, 341 (Fla. 3d Dist. Ct. App. 1987) ("The fact that a co-defendant threatened to kill the declarant in court if he testified. . . does not. . . establish that the declarant was unavailable as a witness in the absence of any evidence that the declarant disappeared and could not be served with a witness subpoena or otherwise brought in as a witness. . .").

286. 391 U.S. 123 (1968).

287. *Id.* at 126.

288. 490 So. 2d 32 (Fla. 1986).

289. See Dobson, *Evidence: Survey of Florida Law 1986*, 11 NOVA L. REV. at 1394-96.

ing himself and the accuser, is not within this exception"²⁹⁰ required exclusion of the statements. Second, the court felt that since the accomplice refused to testify Nelson had no way of exercising his confrontation rights and thus admission of the hearsay violated *Bruton*.

The confrontation violation in *Nelson* fell almost exactly within *Bruton*'s parameters. However, *Nelson* did not have to address another co-defendant hearsay situation which has long posed serious questions. The "interlocking confession" scenario has long been felt by many courts to create an exception to *Bruton*. In *Parker v. Randolph*²⁹¹, four Justices found admission of a non-testifying co-defendant's confession in a joint trial did not violate the Right to Confrontation when the defendant has also confessed. These Justices reasoned that when a defendant's own confession is introduced against him/her, then admission of a co-defendant's confession with proper limiting instructions would hardly be devastating since the jury would most likely focus on a defendant's own inculpatory statement in adjudicating whether the defendant is guilty. Likewise the Justices found that the lack of cross-examination here would have far less practical value for one who has already confessed than for a defendant who maintains innocence. Thus four Justices found no confrontation violation exists in an interlocking confession situation. However, this view was not a clear majority. Justice Blackmun provided the needed fifth vote to affirm the conviction but did so on harmless grounds.

Following *Parker*, two district courts of appeals expressly adopted the plurality's position that when interlocking confessions exist there is no Confrontation Clause violation with admitting the inculpatory statement of an accomplice in a joint trial.²⁹² During the present survey period, the question concerning the admission of a non-testifying co-defendant again arose in *Cipollina v. State*.²⁹³ Cipollina and a co-defendant were charged with the second degree murder of Cipollina's six year child. After a joint trial, Cipollina appealed the jury's verdict of third degree murder, claiming that admission of her non-testifying co-defendant's statements made to a detective violated both section 90.804(2)(c) and her confrontation rights. The second district affirmed in a short but questionable decision which is now definitely bad law.

290. FLA. STAT. § 90.804(2)(c) (1987).

291. 442 U.S. 62 (1979).

292. See *Damon v. State*, 397 So. 2d 1224 (Fla. 3d Dist. Ct. App. 1981); *Whitfield v. State*, 479 So. 2d 208 (Fla. 4th Dist. Ct. App. 1985).

293. 501 So. 2d 2 (Fla. 2d Dist. Ct. App. 1986).

The second district noted that the detective claimed both defendants gave him virtually the same statements. Despite the clear language of section 90.804(2)(c)'s last sentence, the district court found no error. Instead, the court found that this sentence merely codified *Bruton* and that since the second district had followed *Parker's* subsequent modification of *Bruton* neither section 90.804(2)(c) nor *Bruton* precluded admission of Cipollina's co-defendant's statement. *Cipollina* may further have been a questionable decision since it seemed to allow the direct use of a non-testifying co-defendant's statement against an accused. This was *not* the same situation as existed in *Parker* where appropriate limiting instructions had been given the jury, thus the second district seems to have read *Parker's* limited facts wrong.²⁹⁴ Furthermore, if the second district meant to find that the co-defendant's statements were substantively admissible against Cipollina, this is also probably a wrong decision. Following *Bruton*, *Parker*, and *Ohio v. Roberts*²⁹⁵, the United States Supreme Court in *Lee v. Illinois*²⁹⁶, while defining what constitutes an interlocking confession, refused to allow substantive use of one non-testifying co-defendant's confession against another defendant based on the argument that the statement was admissible as a declaration against interest which should be recognized as a firmly rooted hearsay exception for Confrontation Clause purposes.²⁹⁷ Thus whatever the second district reasons for upholding admission of the hearsay in *Cipollina*, they were questionable at the time of the court's decision.

The Florida Supreme Court has never approved use of the so-called interlocking confession exception to *Bruton*. Indeed, section 90.804(2)(c)'s last sentence would seem to prohibit such a position. Even if section 90.804(2)(c) does not, a recent United States Supreme Court decision makes *Cipollina's* rather questionable result clearly obsolete. In *Cruz v. New York*²⁹⁸, the Supreme Court reconsidered its decision in *Parker* and again addressed the question "whether *Bruton* applies where the defendant's own confession, corroborating that of his

294. There may have been a limiting instruction given at trial in *Cipollina*. However, the Second District's extremely brief discussion does not mention one. *Cipollina* as an opinion suffers from a distinct dearth of facts. Unfortunately this same problem is evident in many Florida appellate courts evidence decisions.

295. See *supra* note 271 for further discussion of *Roberts*.

296. 106 S. Ct. 2056 (1986).

297. The Court explicitly rejected the "categorization of the hearsay involved . . . as a simple 'declaration against interest.' That concept defines too large a class for meaningful Confrontation Clause analysis." *Id.* at 2064, n.5.

298. 107 S. Ct. 1714 (1987).

codefendant, is introduced against him."²⁹⁹ This time the Court held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant. . .the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him."³⁰⁰ Thus the Court reduced *Parker* to a situation where the harmless error may prevent reversal when interlocking confessions have been introduced at a joint trial in violation of *Bruton*. *Parker* does not then create an exception as some Florida courts believed, but only means automatic reversal is not required whenever there is a *Bruton* violation.

Obviously the second district cannot be faulted for failing to anticipate *Cruz*. However *Cruz* and *Lee* should serve clear notice that admission of hearsay statements made by a non-testifying defendant is not allowable based on the rationale that such statements are declarations against interest.

299. *Id.* at 1716.

300. *Id.* at 1719.